IN THE

Supreme Court of the United States,

OCTOBER TERM, 1881.

THE FARMERS' LOAN AND TRUST COMPANY, AUTIN CORBIN, GILES E. PAINTOR AND JOSIAH B. BLOSSOM.

v.

CHRISTIAN WATERMAN; A. SNEDEKER; FREDERICK A. W. DAVIS, WM. H. MORRISON, SAMUEL MILLER, JOHN L. KETCHAM, WILLIAM NEEDHAM, PETER DITMARS AND PETER J. BANTA, PARTNERS AS INDIANA BANKING COMPANY; THE SECOND NATIONAL BANK OF LAFAYETTE; THOMAS G. GOLDEN; HENRY C. ADAMS, ASSIGNEE OF INDIANAPOLIS BRASS AND SUPPLY COMPANY; SECOND NATIONAL BANK OF PEORIA, ILLINOIS; INDIANAPOLIS ROLLING MILL COMPANY; GEORGE WOODEN; CITIZENS' NATIONAL BANK OF INDIANAPOLIS, INDIANA; JAMES A. McKENZIE; PULLMAN PALACE CAR COMPANY; WESTERN CAR COMPANY; JAMES A. EADS, RECEIVER OF THE PARIS & DANVILLE RAILROAD COMPANY ET AL.

No. 1212

MOTION TO DISMISS APPEALS AND VACATE SUPERSEDEAS AS TO ALL INTERVENING PETITIONERS IN WHOSE FAVOR SUMS LESS THAN FIVE THOUSAND DOLLARS ARE SEVERALLY DECREED.

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THE FARMERS' LOAN AND TRUST COMPANY, AUTIN CORBIN, GILES E. PAINTOR AND JOSIAH B. BLOSSOM.

v.

CHRISTIAN WATERMAN; A. SNEDEKER; FREDERICK A. W. DAVIS, WM. H. MORRISON, SAMUEL MILLER, JOHN L. KETCHAM, WILLIAM NEEDHAM, PETER DITMARS AND PETER J. BANTA, PARTNERS AS INDIANA BANKING COMPANY; THE SECOND NATIONAL BANK OF LAFAYETTE; THOMAS G. GOLDEN; HENRY C. ADAMS, ASSIGNEE OF INDIANAPOLIS BRASS AND SUPPLY COMPANY; SECOND NATIONAL BANK OF PEORIA, ILLINOIS; INDIANAPOLIS ROLLING MILL COMPANY; GEORGE WOODEN; CITIZENS' NATIONAL BANK OF INDIANAPOLIS, INDIANA; JAMES A. McKENZIE; PULLMAN PALACE CAR COMPANY; WESTERN CAR COMPANY; JAMES A. EADS, RECEIVER OF THE PARIS & DANVILLE RAILROAD COMPANY ET AL.

No. 1212

MOTION TO DISMISS APPEALS AND VACATE SUPERSEDEAS AS TO ALL INTERVENING PETITIONERS IN WHOSE FAVOR SUMS LESS THAN FIVE THOUSAND DOLLARS ARE SEVERALLY DECREED.

The following named intervening petitioners, in whose favor payment of the several amounts set opposite their respective names—together with interest upon said several allowances, at the rate of three per centum per annum, from the 12th day of April, A. D. 1879, to the 31st day of October, A. D. 1881—is decreed, to wit:

Charles F. Webb	$270 00
B. F. Dennison	174 15
Samuel Rouch	175 20
Maxwell Plumly	180 00
John Morain	66 35
Michael O'Brien	33 75
John Watson	46 90
John Lyons	143 45
Edward Kernan	84 95
W. L. Sugett	270 00
Pat. Nevin	17 45
Thomas Maloney	2 70
Pat. Flagherty	16 20
L. F. Alby	143 60
Paul Finnan	19 15
George Abbott	46 50
Charles Neher	211 50
J. A. Davis	319 50
Pat. Stack	123 25
Tim. Donahue	128 80
Daniel Spellman	5 40
Ned. Butler	87 75
L. F. Alby	108 10
John Doyle	28 10
W. A. Atkins	238 50
Michael Finnan	184 70
Pat. Conroy	82 70
Michael Curly	11 40
J. M. Stearns	15 95

Luke Nevin	$95 00
Thomas Starr	65 58
David Stevenson	90 50
Michael Colton	364 25
E. L. Pettibone	144 45
Pat. Hines	288 65
N. J. Humphrey and N. G. Humphrey, partners as N. J. Humphrey & Son	207 60
Michael Gee	14 60
—— Brindley and M. S. Stout, partners as Brindley & Stout	$ 227 35
J. Keenan	12 15
John Michael	200 00
Charles Irons	59 45
John Mickens	22 53
McLean County Coal Company	586 44
Daniel Donahue	52 50
James Naughton	150 75
M. Keiger	109 07
Martin Shockey	262 10
John Brake	227 00
John Mullen	132 45
E. Lendormie	147 50
Lathrop Kazar	112 50
Michael Nolan	161 83
D. C. Cormack	38 90
Alonzo Kazar	54 00
R. G. Weed	211 10
A. H. Wood	42 50
Hugh Martin	190 62
Duncan McLennan	264 60
Philip McLennan	175 39
Thomas Manion	121 50
Alexander McLennan	51 93
Peter O'Neal	87 58
C. T. Richey	113 33

Albert Porter	$245 35
John Quirk	123 00
David Schooley	187 45
Alexander Thompson	453 55
J. V. Trenary	64 91
Aug. Ahlrich	255 15
Michael Bongart	146 06
John Connerty.	192 50
Edward Clancy.	142 40
Fred Clayton	115 15
E K Clayton	327 38
James Connerty	210 96
William Carrier	238 50
James Cady	129 45
Dennis Donnaher	90 20
Frederick Davis	141 58
A. Graham	90 17
Howard Golder	359 85
Thomas B. Hinckle	165 77
Pat. Fitzgerald	15 40
Herman Gerbing	110 22
G. P. Guston	168 96
Barney Lynch	197 23
G. Casper Little	288 93
James McGrath	160 52
William Kerfoot	202 13
C. F. Koesel	320 82
Herman Damon	79 36
E. Heiserodt	369 51
John McDermott	232 75
David H. Price	143 15
R. D. Perry	91 09
C. T. Richey	64 52
Con Ryan	206 81
Edwin Sykes	234 78
Stephen Smith	232 93

David Sidell	$93 95
George B. Johnson	96 48
George Thompson	282 23
John Washer	133 69
E. M. Jordan	103 51
Jo. Walter	168 48
Henry Weinke	105 53
Fred. Weinke	228 11
R. B. Trenary	51 20
Lewis Templin	230 08
John Tong	49 92
James Thorpe	187 73
Z. F. Sharpe	339 05
John Shannon	297 32
S. S. Small	239 90
Henry Riley	126 53
M. F. Meagher	235 73
James Matherson	220 24
Chris. Mallendorf	136 85
John Medrow	197 01
John B. Burns	242 77
Melville Birney	39 29
Fred. Washer	126 10
W. A. Billings	35 44
Mat. Cole	9 90
N. Cunningham	54 95
James Duncan	27 91
Charles Dunlap	27 65
James Cowley	175 04
John S. Creek	57 27
Pat. Bartly	403 07
John Bellchambers	206 15
W. C. Brant	253 09
Charles Bellfield	154 44
S. C. Briggs	182 74
M. Bebus	85 14

S. M. Harvey	$98 57
M. K. Frazee	44 41
Ed. F. Gordon	222 08
Thomas V. Losey	567 66
John Weinke	190 36
H. M. Call	39 38
Thomas Redding	335 01
J. P. Blue	18 81
John R. Timpson	87 11
Patrick Fitzgerald	77 61
John Reynolds	24 44
Edward Henry	156 13
Z. E. Gill	37 54
J. T. Rittenhouse	61 03
Jesse Burt	14 66
A. H. Wood	918 00
Thomas W. McHugh	4 73
Abe Epstein	181 35
E. Halberstadt	39 38
Pat. Fitzgerald	53 92
John Cain	895 61
James Braddock	10 00
Charles G. Yohn	180 25
B. Hutchinson	292 80
C. O. Pease	286 64
W. E. Rowe	300 05
Daniel Higgins	76 50
S. K. Davis	52 90
John B. O'Dell	52 75
P. Jacoby	81 95
Caleb D. Bellville	170 55
Daniel Doyle	156 40
—— Johnson and —— Stout, partners, as Johnson & Stout	116 57
John S. Duncan	39 38
Neal Dugan	7 45

John Leo	$211 03
Vincent Miller	40 50
John W. Loder	318 65
Mike Griffin	335 35
Henry Severin, Frederick Ostermeyer and Berg Applegate, partners, as Severin, Ostermeyer & Co	144 00
David Frey	123 57
David E. Stout	748 09
E. M. Wheeler	140 45
George Freedman	107 15
P. O. Keefe	20 19
Dennis Monk	117 20
Elizabeth Heigle	427 31
John A. Worley	15 75
Tobias Hill	23 65
A. Popkess and —— Popkess, partners, as A. Popkess & Bro	34 65
John Peeble	5 50
Samuel Tarflinger	1 00
G. K. Thompson	3 60
Peter C. McMahon	379 32
Christina Port	139 60
James M. Duncan and James G. Hardy.	164 65
George R. McComas	163 00
J. M. W. Jones	393 39
F. T. Walker and L. W. Walker, partners as Walker Bros.	70 88
Lewis L. Fellows	135 00
D. Hession	168 90
John Toohel	52 10
Samuel A. Johnston and Wm. J. Johnston, partners as Johnston Brothers	363 14
S. Russell, administrator of estate of L. M. Russell	339 50
John Read	306 55

Joseph E. Ludlum	$225 00
Leopold Loeb and Julius Loeb	267 54
Michael Mayer	136 20
John McManomy (assigned to A. Gish)	306 50
Joseph Catherwood	52 85
Jacob S. Hildebrand and James L. Fugate, partners as Hildebrand & Fugate	437 50
George W. Snyder	262 55
William M. Davis	91 53
J. S. Williams	194 74
M. W. Reams	322 65
N. L. Woodruff and —— Ditweiler, partners as Woodruff & Ditweiler	115 60
M. M. Buck	665 49
W. Maltby	68 25
James W. Hess and Samuel C. Hanna, partners as Hess & Hanna	95 20
D. V. Cunningham	634 59
Wm. A. Perry	266 80
M. Ready	225 00
H. Conkling	210 21
W. W. Straight	320 20
Frederick Weyerhauser and Frederick C. A. Denkman, partners as Weyerhauser & Denkman	306 95
Lincoln Coal Mining Company	1,260 76
Livingstone T. Dickson and Charles L. English, partners as Dickson & English	162 58
James S. Hibben, Robert F. Kennedy, Coleman B. Pattison and Franklin Landers, partners as Hibben, Kennedy & Co.	1,310 95
David Berkley	54 00
M. E. Frazee	40 08
James Fisher	69 75

—— Cassell and —— Furnas, partners as Cassell & Furnas	$22 40
Thomas Cassidy	95 15
William T. Smith	315 00
Seth R. Evans	226 09
David Case	139 43
J. W. Hanes	90 00
Peter Sullivan	219 60
Alexander M. Robertson and John C. Perry, partners as Robertson & Perry	161 75
Charles J. Schmidt	394 73
Robert Popkess	580 39
Wilkinson Crane	57 20
H. A. Mulholland	71 80
W. S. Barkley	236 25
Matthew Fawcett	419 46
Jacob Bush	70 57
J. O. D. Lilly	154 88
J. M. Lemon	325 95
H. P. Seymour	56 57
Able R. Angle	288 00
J. D. Swan	319 70
M. A. Stowell	266 60
William Braden	31 50
Monroe Wells	42 00
F. C. Bigelow	108 00
Fred Baggs	23 63
F. Tiernan and —— Tiernan, partners as F. Tiernan & Bro	2,224 43
F. Tiernan and —— Tiernan, partners as F. Tiernan & Bro	27 78
Mary Welch	139 50
Jacob S. Hildebrand and James L. Fugate, partners as Hildebrand & Fugate	81 38
Jacob Magley	101 10

Henry Gorham	$77 92
C. M. Burkert	173 70
D. Sullivan	154 55
W. B. Canary	39 90
Jacob Magley	9 45
S. B. Corbaley	275 22
Jefferson Furnace Company	1,090 41
Anton Rasener and William Rasener, partners as A. & W. Rasener	478 95
—— Allen and —— Allen, partners as Allen & Brother	67 50
Eagle Machine Works	91 00
J. L. Spaulding	54 34
William E. Edwards	70 31
T. L. Canary	240 90
Thomas Clifton	64 82
A. Huddleson	42 75
Patrick Dickson	355 80
W. Bland	101 90
John Inlow	157 50
G. M. McClellan	122 98
Barnum & Richardson Manufacturing Company	2,190 09
James Wall	146 39
John Reedy	71 70
O. P. McCarthy	133 88
I. H. Wilson	91 03
W. H. Prouty	216 79
W. Drinkout	207 09
John W. Brown	466 35
P. F. White	15 30
J. M. Bortle	22 18
W. Black	30 60
Chauncey Kelsey	336 50
C. C. Chamberlain	229 50
Fred Stricken	90 25

S. T. Ford	83 25
William Van Schoick	59 07
William D. Wiles, David W. Coffin and Charles R. Smith, partners as Wiles, Coffin & Smith	230 38
S. Fowler	257 60
Thomas Burke	430 00
S. H. Barney, administrator of estate of J. G. Sanger	294 13
W. Morris	132 80
H. C. Fiegler	185 07
John Huddleson	45 00
Charles H. Cady	105 26
Thomas Burke	55 70
Peter Gallagher	138 03
Thomas Yount	424 18
W. H. Dickerson	175 45
John Roach	125 75
T. J. Tilly	90 00
Erhardt Kramm	51 25
Robert Parker	147 09
John Poland	68 40
Lawson Booe	1,099 35
J. C. Black	12 80
Lyman Fenner	90 90
Miner T. Ames Company	630 00
Wm. Sim	77 03
John L. McKee and R. McKee	139 78
J. C. Maag	8 50
Richard Brodrick	25 00
C. H. W. Werneke	52 77
Frank L. Robinson	113 65
Charles D. Webster, Benjamin M. Davis and James M. Davis, partners as Webster, Davis & Co	3,734 88
George W. McCurdy	200 90

John Kerns	$137 00
A. B. Gillett	203 19
James Dukes, administrator of estate of H. Dukes	257 10
William Strover	7 79
Herman Strover	78 44
Andrew Olson	234 45
Jere. Ambrose	257 99
W. H. Nevill	34 69
James Braddock	315 74
William Preston	97 45
John Mealy	36 18
Fred. Borchers	232 40
Fritz Meyer	162 00
J. H. Wynd	208 50
John Lindrot	210 45
Thomas Richmond	259 93
J. W. Brown	41 90
Henry Chester	47 25
Charles E. Mott	123 40
D. H. Roach	47 25
Michael Regan	61 20
W. B. Carr	116 07
John Naylor	152 65
John W. Lindsay	225 00
Reuben McIntyre	47 49
P. Padgen	160 65
John Reynolds	123 81
Frank Bailey	389 10
O. Thomas	22 05
Frank Donelly	120 84
David McClunn	81 68
J. H. Helms	337 40
Jere Quirk	105 10
George Cruikshanks	410 67
John Malone	158 42

Robert Davidson	$77 66
Jo. Downey	125 72
Herman Rolland	85 67
Jo. Rolland	66 94
Martin Mower	94 68
D. W. Bruce	203 09
Finn Blue	14 69
John Hill	50 67
Richard Boyle	212 75
John Donahue	135 00
William Voldt	214 20
George Cummings	56 44
Joseph Beaumont	66 63
Isaac Littler	32 38
E. Kelly	97 41
Jos. Johnson	226 82
Adolph Maker	230 74
Thomas P. Jones	336 95
Alfred Lyons	209 70
Daniel Sanderson	201 75
William Holmes	174 30
Thomas F. Cunningham	60 00
David Lier	171 40
James McWilliams	19 60
J. W. Trenary	56 35
William Doyle	171 81
George Doyle	55 57
Fred Shoemaker	166 25
M. F. Clark	23 25
Patrick Ash	38 95
Ed. Duncan	21 97
James Loy	152 16
C. Hess	14 60
W. L. Pershing	179 33
John Noonan	9 84
Jo. Miller	217 53

William T. Sutton	$348 56
Pat. Murphy	70 40
Henry Teadtey	111 90
J. B. Whitsett	201 60
Louis Kreiger	186 24
John Laird	170 01
Charles Kreiger	81 11
Frank Brickett	64 95
John Wahl	228 59
George Yanos	251 52
S. A. Carter	220 55
Charles Sell	182 18
Gus. T. Johnson	137 70
Timothy Lane	87 75
Patrick Ryan	167 40
Henry Stewart	172 24
Thomas Nolan	5 47
E. E. Phillips	635 35
Joseph Park and —— Royer, partners as Park & Royer	386 49
Samuel E. Long	246 65
Frank G. Jacques	282 32
Samuel Epstein	61 29
J. H. Swearinger	40 50
William A. Wilkinson	76 50
Herman Myer	223 45
M. D. Busey	19 60
V. W. Shuck	104 34
P. D. Smith	164 05
A. Johnson	98 48
V. W. Shuck	73 46
J. W. Shuck	66 94
G. G. Webber	3 50
—— Hollister and William H. Baker, partners as Hollister & Baker	43 67
Harriet Hook	29 84

John S. French	$49 50
Joseph Kline	214 60
Patrick Coffey	706 49
A. P. Cunningham & Co	50 58
D. H. Loper	16 67
S. H. Busey	22 27
Henry D. Stolte	39 38
S. A. Carter	45 00
Stephen A. Allen	199 59
John Skellman	172 38
A. Bowman	38 85
Jo. Kreiger	226 19
G. W. Dunlap	39 38
Jere. Dwyer	304 06
Henry Coburn and William H. Jones, partners as Coburn & Jones	155 71
Wesley City Coal Company	2,695 57
Levi C. Morris	20 70
John A. Irwin	189 00
Frank A. Maus	29 30
Allen Coleman	38 95
A. J. Allen	312 86
Chris. Schetter	76 50
Thomas J. Noble	343 55
Charles Edgerton	75 55
Pat. Farrell	35 10
Thomas O'Dea	129 80
Daniel G. Vollmer	249 70
Pat. Hughes	166 50
Michael Trees	33 90
John Kistner	51 75
Abram Van Tuyl	507 59
Milton R. Miller	369 00
Charles Mayer	20 48
William Bottorf	177 41
John Dwyer	75 90

Morris R. Eddy and Charles M. West, partners as Eddy & West	$204 85
W. B. Todd	57 71
S. T. Ford	288 44
R. H. Austin	228 86
L. A. McReynolds	96 47
H. C. Boyce	202 50
James Hayden	166 53
N. H. Phipps	161 61
Nicholas Motherway	220 02
Oscar D. Lewis	9 78
A. G. Kingman	481 99
Ed. Higgins	30 85
Thomas Troy	142 90
W. B. Walters	266 70
Michael Troy	141 70
Patrick Troy	145 05
James Shea	61 90
Frank Simons	53 45
I. C. Murray	184 66
James McLaughlin	114 32
Thomas Gouran	111 30
M. Conroy, Sr.	207 90
W. K. Owens	170 93
Thomas Murphy	36 00
Mike Murphy	96 25
John Barrett	77 60
James Ryan	32 40
Lulu G. White	86 61
T. E. Halls	191 25
C. H. Foster	286 88
C. H. Foster	21 27
J. Clegg, Sr., and J. A. Clegg, Jr., partners as J. A. Clegg & Co	76 56
Cabinet Makers' Union	53 73
William H. Restieaux	52 10

John F. Yates	$265 50
Mrs. C. Jones	296 30
Pat. Haud	36 45
T. E. Halls	25 04
Valentine Meier	148 40
W. F. Rupp	49 61
John Fleming	59 80
John A. Littler	72 45
John Dowling	114 10
Charles Cox	72 00
John Condon	461 45
F. M. Canady	116 40
George W. Graham and —— Graham, partners as Graham Brothers	443 60
Pat. Glacken	155 90
M. Cadle	66 68
W. Kelly	13 85
E. S. Alexander	23 38
D. F. Hill	87 40
Con. Cronin	37 15
John Condon	225 00
Thomas Costello	56 25
John Curran	69 75
Thomas Brown	77 60
Charles Bade	216 00
John H. Bowlby	158 79
S. T. Bell	150 36
E. S. Alexander	91 80
P. Gallagher	89 30
M. Galvin	198 00
Joseph Hickman	146 25
Fred Hacker	153 60
Joseph Hacker	134 45
Dayton Hockenlay	104 25
S. P. Hovey	98 92

D. F. Hill	$30 00
C. Hilliard	48 35
H. Jegar	120 65
H. Jegar	265 35
F. Klefker	173 25
V. M. Lincoln	67 50
Dan Dwyer	144 05
T. Damlo	30 00
John Felgenhauer	114 75
John Kelly	89 70
Jack Kelly	49 30
Pat Hart	94 75
James Hoolihan	88 15
John Dowling	802 05
L. A. Lucas	102 30
L. A. Lucas	5 40
Samuel Backus	110 70
William Hoolihan	92 55
J. N. McBroom	227 85
M. Murphy	64 05
P. Mulvihill	51 75
Walter Martin	257 75
H. J. Meeham	162 25
Thomas Roach	13 04
Gus. Markt	31 50
Daniel McNurney	155 75
Pat. McIntyre	120 90
Pat. Murphy	188 35
Fred. Ninke	129 95
——Mitchell and Octavius A. Crowley, partners as Mitchell & Crowley	54 40
Joseph Yerger	27 00
John S. Little	226 84
W. J. Crowther	96 61
David S. Benson	51 66
Delos Root and David S. Benson	1,090 41

William Daggett, George C. Webster and James W. Smither, partners as Daggett & Co	$231 20
F. A. Switzer	142 20
Duain P. Whitney and Robert S. Johnson, partners as Whitney & Co	146 16
John Walsh	75 05
Robert Shaw	81 25
L. G. Rand	45 00
O. B. Corwin	311 48
W. R. Throckmorton	16 20
Richard M. Pinckney and Theodore Pinckney, partners as Pinckney Bros	126 00
N. J. Foley	34 20
Henry Baden	351 30
George Pfau and Patrick A. Ward, partners, as Pfau & Ward	180 00
A. Kostanzer	43 31
Tim Sheehan	52 50
J. W. Thompson	1,577 54
Christian Waterman	69 77
William M. Fletcher	271 30
Sarah Conover	31 50
N. E. Snow	130 15
William Worrell	89 80
A. W. Alexander	18 68
John D. Johnson	59 85
Jo. P. Horton	45 85
Lewis Wagner	307 06
C. H. Winecup	45 00
O. C. Parmelee	74 97
Alexander Spence	241 78
Joseph E. Hunt	269 71
John W. Somers	40 98
C. F. Cummings	68 69
Tim Sheehan	160 65

D. F. Hill	$30 00
C. Hilliard	48 35
H. Jegar	120 65
H. Jegar	265 35
F. Klefker	173 25
V. M. Lincoln	67 50
Dan Dwyer	144 05
T. Damlo	30 00
John Felgenhauer	114 75
John Kelly	89 70
Jack Kelly	49 30
Pat Hart	94 75
James Hoolihan	88 15
John Dowling	802 05
L. A. Lucas	102 30
L. A. Lucas	5 40
Samuel Backus	110 70
William Hoolihan	92 55
J. N. McBroom	227 85
M. Murphy	64 05
P. Mulvihill	51 75
Walter Martin	257 75
H. J. Meeham	162 25
Thomas Roach	13 04
Gus. Markt	31 50
Daniel McNurney	155 75
Pat. McIntyre	120 90
Pat. Murphy	188 35
Fred. Ninke	129 95
——Mitchell and Octavius A. Crowley, partners as Mitchell & Crowley	54 40
Joseph Yerger	27 00
John S. Little	226 84
W. J. Crowther	96 61
David S. Benson	51 66
Delos Root and David S. Benson	1,090 41

William Daggett, George C. Webster and James W. Smither, partners as Daggett & Co	$231 20
F. A. Switzer	142 20
Duain P. Whitney and Robert S. Johnson, partners as Whitney & Co	146 16
John Walsh	75 05
Robert Shaw	81 25
L. G. Rand	45 00
O. B. Corwin	311 48
W. R. Throckmorton	16 20
Richard M. Pinckney and Theodore Pinckney, partners as Pinckney Bros	126 00
N. J. Foley	34 20
Henry Baden	351 30
George Pfau and Patrick A. Ward, partners, as Pfau & Ward	180 00
A. Kostanzer	43 31
Tim Sheehan	52 50
J. W. Thompson	1,577 54
Christian Waterman	69 77
William M. Fletcher	271 30
Sarah Conover	31 50
N. E. Snow	130 15
William Worrell	89 80
A. W. Alexander	18 68
John D. Johnson	59 85
Jo. P. Horton	45 85
Lewis Wagner	307 06
C. H. Winecup	45 00
O. C. Parmelee	74 97
Alexander Spence	241 78
Joseph E. Hunt	269 71
John W. Somers	40 98
C. F. Cummings	68 69
Tim Sheehan	160 65

Pat Flisk	$107 00
Cornelius Griffin	165 25
John Murphy	181 20
Henry Bredehoft	43 20
John W. Buckner and Wm. A. Coulson, partners as Buckner & Coulson	597 10
H. Barden and J. M. Barden, partners as H. & J. M. Barden	113 62
Fred. Vuthrick	50 00
Nicholas Geiger	67 55
Henry Sloan	356 30
Wm. G. Sloan and Jonas P. Johnson, partners as Sloan & Johnson	372 40
John Bowers	131 25
Jacob M. Troutman	72 00
J. D. Brown	24 00
J. W. Hines	99 60
George Bunn	529 65
N. S. Hodge and W. M. Hodge, partners as N. S. & W. M. Hodge	11 28
B. A. Buck	54 00
Peter Keough	15 95
Barnard Doulan	92 25
John Sloan	225 00
Ira Abbott	13 00
James Persifer	49 50
Con. Buckley	156 45
C. Russmissell	22 05
S. W. Baker	170 50
Peter Keough	225 00
J. W. Hines	14 75
Frank Franz	146 90
Charles Shultz	144 60
Bernard Doulan	95 70
S. A. Stillwell	29 25
Joel M. Barlow	183 49

J. D. Brown	$239 55
John Smith	21 00
Henry Marshall	19 70
J. W. Davidson	86 60
James Belton	66 00
Reason Bolton	15 00
P. H. Scott	35 20
Peter Standahar	48 35
W. Nebeker	23 15
William Bolton	33 20
Peter Standahar	19 55
J. W. Egbert	83 30
Anthony Furlong	225 00
W. H. Balsley	45 00
John Nally	240 10
Anthony Furlong	27 75
John Nally	129 96
Mark Carley	78 75
W. E. Nicholas	49 65
Bridget Hogan	48 30
James Nicholas	242 39
L. H. Parks	118 50
M. Y. Coleman	187 90
W. B. Bailey	33 85
J. F. Humphreys	191 14
J. Nicklisson	844 67
Michael Naughton	19 30
William J. Lowry	599 30
Herman Shultz	19 25
—— Loomis	675 71
Silas T. Bowen, Charles F. Haines, Darwin G. Eaton and Frank C. Eaton, partners as Bowen, Stewart & Co	490 94
William Lamb and Lewis Haines, partners as Lamb & Haines	2,493 10
L. Ludorf	18 00

Eli Meiser	$1,385 56
——Hoops and——Townsend, partners as Hoops & Townsend	605 47
James Sexton	53 70
John Malone	42 20
John Noonan	35 25
Michael Mahoney	70 35
John Sullivan	66 90
Pat. Casey	70 80
John Keefe	27 35
William Hall	11 03
August Lucas and——Lucas, partners as Lucas Bros	42 75
J. K. Kelly	32 50
——Heilman and Charles Dumser, partners as Heilman & Dumser	143 40
J. G. Herget	184 50
Florence Barrett	90 60
Henry Hoer	332 55
C. R. Cummings	25 20
M. Bailey and T. I. Bailey, partners, as M. Bailey & Son	206 57
J. H. Besazk	192 90
G. Kaufman	42 05
E. M. Hobert	90 00
E. M. Wheeler	45 00
A. N. Rolofson	75 00
——Oberly and Peter Euler, partners as Oberly & Euler	44 00
J. Roos and Henry Roos, partners as J. & H. Roos	20 00
H. J. Jaeckel	16 35
Peter Weyrick, and John Weyrick and —— Herring, partners as Weyrick, Herring & Co	18 00
George J. Webber	310 40

August Lucas and —— Lucas, partners as Lucas & Bro	$116 45
Wm. Bushel and —— Bushel, partners as Bushel Brothers	45 00
Wm. Bloom	27 65
C. J. Elliott	18 05
John Cahill	15 60
Thomas Kelly	136 80
Dennis Mahoney	50 45
Wm. M. Lucas	117 35
J. H. Franks	560 30
D. Knapple	74 35
L. Dietrick	9 00
John G. Zimmer	25 00
Pat. Wheelan	18 75
Charles H. Ketcham	73 15
Edwin H. Price	184 75
George Ater	110 23
Pat. Lynch	24 60
—— Shipper and Henry Black, partners as Shipper & Black	21 70
S. Solomon and M. Solomon, partners as S. & M. Solomon	67 94
S. Webster	78 65
John Mink	138 95
G. L. McCray	30 40
P. Sheehan	44 45
Tim. O'Connell	776 05
Frank McCarty	150 25
N. Thompson	218 75
Thomas Moran	102 60
Cornelius Freidgen	375 00
M. Frees	16 20
John H. Lewis	1,774 06
John E. Knox	620 73
Hiram Rains	1,347 50

Pat. McDonald	$172 81
Samuel Shultz	119 70
William Shultz	128 25
Charles Sodewasser	109 10
H. B. Stewart	106 14
Walter Vaughan	28 50
G. W. Smith	162 00
E Silkey	9 58
Pat. Ruddell	49 55
Pat. Ruddell	54 00
John Roach	180 00
J. F. Robison	113 58
Barney Sheehan	716 80
William O. Shreve and —— Swearinger, partners as Swearinger & Shreve	139 92
Con. Reagan	225 00
John Poggendorff	129 35
—— Maxwell and —— Wheeler, partners as Maxwell, Wheeler & Co	77 49
United States Wind Engine and Pump Company	144 00
Crescent Spring Company	421 87
O. Shreve	90 00
Christ. Priest	74 94
A. Narry	77 60
Jacob Rawling	172 40
George H. Heitkam	234 54
George W. Wheat	6 30
Stephen Fowler	35 45
N. Abrahamson	74 75
W. Evans	21 55
J. Condon	108 10
G. E. Howe	46 06
W. Hervey	19 05
T. C. Tomlinson	10 10
W. Hennessy	47 20

Erastus Rhodes	$89 55
C. J. Elliott	119 82
William Pfafflin	274 89
J. Dobson	60 30
G. T. Williams	122 65
M. Lindley	37 41
Hannah Curran	21 25
Barney Sheehan	9 65
Joseph Becker and Henry Schwinge, partners as Becker & Schwinge	171 04
Susan Trout	82 10
Atlas Works	192 50
John Creerar, J. McGregor Adams and J. Hall Dow, partners as Creerar, Adams & Co	1,225 83
John Birney	55 35
—— Thompson and —— Pollard, partners as Thompson & Pollard	12 12
W. W. Ward, administrator of estate of Uzal Ward	67 00
Leon Kahn	113 35
Joseph M. Whitsett	17 70
James T. Layman, Simeon B. Carey and Harvey G. Carey, partners as Layman, Carey and Co	2,220 69
J. Brandstetter	9 70
Samuel M. Noel	23 65
Edward C. Egan and Atwater J. Treat, partners as Egan & Treat	166 77
John Tucker	65 45
John Rolf	104 80
William Sardison	122 40
George Bogend	168 15
Dirk Tjarks	151 90
Henry Runts	150 50
E. A. Casey	67 50

N. Shirtleff	$9 00
J. G. Thieme	62 10
Carl Roll	176 50
Charles Polster	86 30
Jacob M. Main	105 15
Charles J. Schneider	121 59
H. A. Verrill	108 00
Hezekiah N. Goe	30 00
A. P. Poor	9 40
T. J. Hogan	62 30
Lieberman I. Mossler and Solomon Mossler, partners as L. I. Mossler & Bro	21 90
C. Kinander	101 95
William H. Roll and James W. Morris, partners as Roll & Morris	65 25
Alfred H. Gladden, —— Cope and —— Hunt, partners as Gladden, Cope & Hunt	685 62
Jesse Jones	352 33
Pat. Walsh	161 50
J. McManomy, (assigned to A. Gish)	173 00
J. Clove	152 78
James F. Dain, —— Westlake and —— Covert, partners as Dain, Westlake & Co	512 23
Austin Gunnison	3,786 14
Amos Hook	73 50
George Glasscock	338 63
Charles P. Watson	53 13
George W. Parnell	19 26
Joseph Delworth, George Porter, H. M. Colfand J. H. Swett, partners as Delworth, Porter & Co	3,647 47
W. H. Brown	87 50

Robert M. Lockhart and W. C. Lockhart, partners as R. M. & W. C. Lockhart	$77 15
Edward C. Abdill and ——Abdill, partners as Abdill Brothers	27 00
William Hurley, adm'r of M. Hurley dec'd	57 40
Pat. Casey	8 25
Joseph Bailey	18 75
John Farrell	48 15
Martin Brachall	23 00
H. M. Kimball	33 25
Thomas Connor	68 40
Pat. Rosater	81 00
Joseph G. English	405 85
Charles Stubbins	114 65
Clinton D. Hunter	20 00
John Grote	50 65
William W. R. Woodbury	58 55
William Henly	59 05
Fred Shultz	101 00
William Silliman	68 60
M. Barrett	14 15
Jacob Hill	33 05
Dietrich C. Smith and —— Felton, partners as Smith, Felton & Co	204 30
Bernard Goldsmith	144 86
Indianapolis Chair Company	250 00
Francis Keay	101 90
William Whitehead	59 40
H. A. Ewing	43 00
J. A. Saylor	24 30
H. J. Oakwood	26 10
Philip M. Gapen	10 42
John C. Brown	41 70
Gabler & Sherer	395 25

Albert A. Knapp	$160 75
R. Maher	225 00
W. S. Marshall	234 00
Pat. Gavin	100 05
M. C. Straight	163 15
N. J. McConny	145 30
James E. Mooney, Wm. A. Taylor and Wm. H. Smith, partners as Mooney, Taylor & Smith	1,779 40
D. S. Hartshorn	283 44
Julius C. Walk	161 68
Thomas E. Chandler and Franklin Taylor, partners as Chandler & Taylor	72 90
William Burford	91 00
A. Burdell	180 00
W. E. Walters	68 60
J. P. Stewart	11 55
Henry C. Diehl	503 38
J. W. Adams	153 75
Isaac L. Franklin	177 18
Joseph G. English	229 80
E. Wells Sackett and George W. Sackett, partners as E. Wells Sackett & Brother	252 48
M. Conroy	41 20
Indiana Transfer Company	227 71
Western Union Telegraph Company	320 30
Wm. Dell, Frank M. Dell and Edward Dell, partners as Dell & Sons	30 49
Nancy Webb	54 95
Frank Linderman	27 00
David Colter	33 22
William G. Fuller	157 50
D. Hillman and —— Hillman and —— Hillman, partners as Hillman & Sons.	610 68
D. W. Ross	72 40

Elijah Hewey	872 55
A. C. Bryant	45 52
S. F. Custer	15 51
John Leo	157 50
G. W. Harmison	262 47
George E. Howard	2,147 35
John W. Adams	435 60
C. S. Reynolds and Charles S. Cutter, partners as C. S. Reynolds & Co	1,342 51
S. E. Kenyon	32 00
E. Armstrong	27 13
William Dickson	37 63
W. H. Posey	232 40
Mary Marks	55 00
James F. Boots and — Canine, partners as Boots & Canine	12 37
Albert C. Jennison	7 20
John Sullivan	13 50
Samuel T Busey and —— Busey, partners as Busey Brothers	653 82
Dennis O'Conner	9 00
E. H. Cushman	75 95
William Webb	332 95
William Brotherton	230 13
Peter Peterson	74 90
Charles Schonheider	30 00
H. O. Case	111 62
Daniel Keplinger	50 95
J. S. Clark	43 23
James Phillips	127 25
Franklin Pierce, administrator of estate of George Pierce	143 87
J. W. Nichols	11 11
S. T. Wright	28 44
Joseph Tool	22 62
J. B. Mercer	9 15

Gus Freeman	$45 68
Peter Hamilton	67 60
Wendell Farishon	88 77
Wilber Holmes	96 68
John Tierney	16 41
William Stiebing	166 21
Lewis Holliday	90 00
L. Paramore	20 00
James Fulton	125 17
Thomas Murray	217 70
William Williamson	94 00
Thomas McCrabb	67 65
Charles Backus	213 33
Michael Motherway	6 30
Dennis O'Brien	82 29
A. W. Yant	63 04
A. L. Woodard	162 06
Jesse Wilkinson	144 00
Joseph W. Wenger	95 15
Lewis Miller	199 05
Philip Johnson	123 24
James C. Dunning	202 50
John B. Roher	155 09
C. W. Baker	197 18
Edward Swan	292 10
John Webb	97 26
F. Shree	66 68
J. Jackson	76 48
Thomas Sheehan	69 45
George B. Lott	29 62
Thomas Stofer	142 63
James Fahey	9 50
L. W. Glass	270 00
John Rotholz	84 55
Edward Bartley	94 94
Al. Hampton	60 95

Rit. Calhoun	$111 91
John Adams	27 60
Martin Ryan	51 75
James Barnard	17 15
William Heller	46 90
S. McWilliams, administrator of estate of Thomas McWilliams	45 57
Aurelia Kellerstrous, administrator of the estate of Dan. Kellerstrous	165 25
V. Phillips	136 55
Frank Cornell and —— Smith, partners as Cornell & Smith	62 05
Mrs. Ann Peters	104 75
Louis H. Mossler	59 66
C. F. Lucas	748 30
C. F. Lucas and Fabius M. Finch	959 88
Fabius M. Finch for —— Maddox	761 25
John Kitchen	358 00
John Russell	34 45
Barrett White	11 70
Frank Mayer	31 95
M. Raphael	15 30
Henry S. Ottenheimer and —— Ottenheimer, partners as Ottenheimer Bros.	5 85
J. A. Weil	28 00
James Dunlap	12 21
Augustus Spiegel, Frederick Thoms and Henry Frank, partners as Spiegel, Thoms & Co	364 44
W. McLaughlin	30 25
D. H. Parmelee	35 53
John Keiler	408 25
C. W. Phillips	7 35
M. Wright	57 70
Wm. Neff	45 00
T. J. Hogan	27 00

A. Hedge	$116 35
C. Hicks	54 45
Pat. Curry	140 40
John Secrist	127 80
G. Runyan	135 00
W. Slake	173 25
Pat. Kearney	69 35
B. F. Tomlinson	180 00
City of Urbana, Illinois	325 50
John L. Green and John L. Zimmerman, partners as Green & Co	22 73
J. A. Littler	60 75
G. A. Newton	135 05
John Ellis	101 44
Samuel M. Noel	12 50
James Sullivan	13 50
H. B. Hopkins and J. Herschel Morron, partners as Hopkins & Morron	185 75
—— Wrigley and William Cutter, partners as Wrigley & Cutter	401 40
W. S. Mead, administrator of estate of S. D. Mead	118 13
D. H. Parmelee	444 19
Oliver McLaughlin	94 10
W. W. Manspeaker	70 83
N. R. Baker	62 55
J. W. Hines	180 00
E. E. Fleming	160 55
L. M. Fairbanks	114 30
J. F. Housman	180 00
P. Anderson	32 95
Edwin A. Davis	78 65
N. E. Shaw	15 65
Paul J. Murphy	29 25
A. J. Poole	152 75
E. P. Miller	25 33

Milton M. Landis, Franklin Caldwell and John C. McCutcheon, partners as Landis, Caldwell & Co	$449 56
J. W. Hendricks	405 95
John Lightle	262 50
B. M. Chaffee	1 75
George W. Flynn and J. H. Woodmansee, partners as George W. Flynn & Co	2,159 24
George W. Flynn and J. H. Woodmansee, partners as Illinois Printing Co	1,086 68
Augustus Spiegel, Frederick Thoms and Henry Frank, partners as Spiegel, Thoms & Co	41 50
R. H. Carnahan	477 79
J. D. McKenzie	30 50
Fred Eynatten	25 00
Williams Tool Company	280 00
Julia Tully	48 65
P. W. King	198 20
Pat. Thornton	138 40
J. G. Blaine	577 50
J. W. Perkins	52 32
John Ryan	77 10
D. P. Bagley	65 63
H. Connerty	67 38
James Throckmorton	24 89
Thomas Cassidy	95 15
Pat. Rowan	121 90
James Walsh	199 80
Samuel M. Cambern	25 00
Simon Toolan	29 20
George W. Graham and —— Graham, partners as Graham Brothers	440 65
H. Peddicord	40 02

W. I. Saffle	$105 35
B. Stimler	8 10
H. Swannell	26 25
Loranda Green	19 25
A. Huff	25 38
J. P. Webber	11 03
W. D. Yount	56 90
E. P. Miller	114 75
J. A. Howland	31 25
G. L. Bona	17 35
C. L. Lowentrout	8 55
W. F. Larimore	41 55
Charles Smith	50 50
C. C. Culbertson	170 80
John M. Longstreth	67 38
Miner Neal	123 80
Charles Reily	105 80
Henry Hunt	225 00
John Bradbury	68 60
James Broderick	75 15
John J. Craig	57 45
J. Case	17 72
John Clifford	129 40
David Rhodes	93 40
A. C. King	8 90
Jack Downey	31 05
Benjamin Adams	37 10
Pat. Dell	115 90
Volney Freeman	59 28
George Tamsett	359 98
Thomas Cratty and —— Cratty, partners as Cratty Bros	96 15
Henry Meyer	72 00
Aloy C. Walker	56 31
James Grant	81 00
J. T. Neal	56 30

D. J. Ford	$58 55
L. A. Lucas and —— Lucas, partners as L. A. Lucas & Bro	24 90
Pittsburgh, Cincinnati and St. Louis Railroad Company	3,634 90
James Curley and John Curley	822 50
Albert P. Lewis	510 00
John Foster	74 00
E. G. Cornelius	306 00
J. Q. Jones	71 25
David E. Stout	8 31
T. J. Dolan	632 45
W. J. Morden	754 99
—— Smith, —— Hippen and E. F. Unland, partners as Smith, Hippen & Co.	40 25
Nelson Phipps	19 50
James E. Mooney, William A. Taylor and William H. Smith, partners as Mooney, Taylor & Smith	164 80
James Gookins and —— Martin, partners as Gookins & Martin	9 00
Benjamin E. Smith, assigned to George Nebeker and Abraham Gish	698 17
J. W. Wallace	103 56
W. H. Smith	126 04
G. W. Snyder	21 60
Horace Parrott and John R. Nickum, partners as Parrott, Nickum & Co	28 50
L. Mayer	938 83
Livingston T. Dickson and Charles L. English, partners as Dickson & English	228 09
Jesse M. Richards	3,564 83
Charles W. Fairbanks	13 60
Deloss Root and Jerome B. Root, partners as D. Root & Co	52 20

Charles C. Claflin	$229 00
M. Kinney	71 65
Nicholas McCarty	228 25
James Frank	46 35
August Mai	66 60
David D. Long, assignee of R. S. Colter.	107 95
H. W. Hildebrand and —— King, partners as Hildebrand & King	72 45
W. L. Suggett	538 58
Henry C. Adams, assignee of —— Northrop	4,314 17
Reginald R. Parker	390 98
William Burke	15 60
A. F. Ramsey	1,501 60
Benjamin Belldand, administrator of estate of David Rawles	26 60
George Nebeker and Abram Gish, partners as Nebeker & Gish	550 00
W. W. Coe	225 00
George F. McGinnis, assignee of Wheelock P. Bingham	2,144 95
John Beard	482 50
Luitgue Roelfs, George S. DeVries, partners as Roelfs & DeVries	347 76
John Weedman	136 00
W. F. Slater	600 63
Lawson Abbott	90 68
Isaac Kahn	1,271 92
C. A. Rathbun	330 30
G. Beckenholdt	166 50
Ephraim C. Dawes and John A. McGettigan, partners as Dawes & McGettigan	88 75
Dennis Leary	142 30
Alphonso Lent	1,885 60
Patrick Coffey	20 49

Pat McIntyre	$60 50
Harry Dugan	25 00
D. Grauman	30 14
A. C. McPheeters	23 00
H. C. Oliver	389 35
Joseph Lammers	420 15
C. M. Kelly and —— Huff, partners as Kelly & Huff	189 35
—— Parker and —— Hopkins, partners as Parker & Hopkins	99 00
Thomas M. Rinn	2,701 84
David Meyer	195 13
William M. Rice, administrator of estate of J. J. Rice	99 49
B. F. Ayton	44 00
Catherine Rusche	33 00
Wm. J. Lowry	60 00
Goldsmith Gordon	37 50
E. H. Robinson	25 00
J. B. Pickets	82 00
Joseph E. McDonald, John M. Butler, Frank B. McDonald and George C. Butler, partners as McDonald & Butler	839 35
——Weldon and —— Aldrich, partners as Weldon & Aldrich	780 00
Robert G. Ingersoll	777 22
Charles W. Fairbanks	331 55
Peter F. Bryce	8 80
George Nebeker	735 44
Elijah S. Alexander	638 75
Robert Connely	748 49
Morgan Lubricating Oil Company	877 19
Patrick C. Leary, administrator of estate of John Hallerand	120 15
George W. Flynn	292 79

J. W. Todd	$315 29
Tim Shay	86 95
James Shay	63 86
Henry C. Darnell	61 05
Michael Grady	67 10
Solomon Claypool and William A. Ketcham, for the use of P. Boderson.	135 00
Michael Gimbel	41 55
Edward Hays	66 95
Sarah G. Wingate	33 75
William W. Martin	47 25

Come now by their solicitors and enter special appearance herein, and each severally moves the court to dismiss the appeal, and vacate the supersedeas granted herein, as to each of said several intervening petitioners herein above named, for the following reasons, namely:

1. Because the amount decreed severally in favor of each of said several intervening petitioners herein above named, does not "exceed the sum or value of five thousand dollars, exclusive of costs," and therefore this court has not jurisdiction to hear and determine appeals from said several decrees.

2. Because the said several intervening petitioners herein above named, have not been named, either as appellants or appellees, upon the docket of this court, or in the transcript filed herein.

3. Because said appeals and supersedeas were prayed, and granted by the court below, in behalf of the Farmers' Loan and Trust Company as one of the appellants; which corporation—as is conclusively shown by the record—is not a party in interest in said appeals, and is not in any manner interested in the final issue of said appeals.

4. Because said appeals and supersedeas were prayed,

and granted by the court below, in behalf of Austin Corbin, Giles E. Taintor and Josiah B. Blossom as appellants, and because said Corbin, Taintor and Blossom were not parties to the suit in the court below, and have never become such parties to the record, by petition or otherwise, as to entitle them to prosecute these appeals.

5. Because the decree of October 31, 1881—upon which appellants claim to base their present action—is *several*, and not joint, and was rendered upon distinct, separate and several intervening petitions, and testimony, introduced severally thereunder, said several intervening petitions and testimony being in no manner connected with, or dependent upon, each other.

Therefore a joint appeal does not lie from said several decrees, and no appeal can be prosecuted from any or either of said several decrees decreeing payment of a sum less than five thousand dollars exclusive of costs.

6. Because said appellants are seeking, by a joint appeal and supersedeas, to appeal from a mere *finding* of the court below, from which no appeal lies, and upon which no one of said several decrees is wholly based, or necessarily dependent.

7. Because appellants are in this action, in legal effect, seeking to prosecute an appeal from the *final decree of foreclosure*, rendered A. D., July 18, 1877, and—upon motion of Farmers' Loan and Trust Company—modified on May 8, A. D. 1878, from which final decree, and modification thereof, no appeal can now be taken, the said final decree and modification thereof, fixed and determined the legal rights and priorities of all parties and intervening petitioners—excepting and reserving only the determination of the several *amounts* to be allowed to the intervening petitioners. The decree of October 31, 1881, was rendered in further-

ance of, and to secure the performance of, the provisions of said final decree and the modification thereof. It simply determines the *amount* due to each of the several intervening petitioners, which is the only question reserved in said final decree. Hence, the only question raised by appeal from the decree of October 31, 1881, is the question of the *amount* decreed to each of the several intervening petitioners. Therefore no appeal can be prosecuted from any, or either, of said several decrees decreeing payment of an amount not exceeding the sum or value of five thousand dollars exclusive of costs.

Respectfully submitted,

McDONALD & BUTLER,

CLAYPOOL & KETCHAM,

Solicitors for Intervening Petitioners.

By JOHN M. BUTLER.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1881.

THE FARMERS' LOAN AND TRUST COMPANY, AUTIN CORBIN, GILES E. TAINTOR AND JOSIAH B. BLOSSOM.

v.

CHRISTIAN WATERMAN; A. SNEDEKER; FREDERICK A. W. DAVIS, WM. H. MORRISON, SAMUEL MILLER, JOHN L. KETCHAM, WILLIAM NEEDHAM, PETER DITMARS AND PETER J. BANTA, PARTNERS AS INDIANA BANKING COMPANY; THE SECOND NATIONAL BANK OF LAFAYETTE; THOMAS G. GOLDEN; HENRY C. ADAMS, ASSIGNEE OF INDIANAPOLIS BRASS AND SUPPLY COMPANY; SECOND NATIONAL BANK OF PEORIA, ILLINOIS; INDIANAPOLIS ROLLING MILL COMPANY; GEORGE WOODEN; CITIZENS' NATIONAL BANK OF INDIANAPOLIS, INDIANA; JAMES A. McKENZIE; PULLMAN PALACE CAR COMPANY; WESTERN CAR COMPANY; JAMES A. EADS, RECEIVER OF THE PARIS & DANVILLE RAILROAD COMPANY ET AL.

No. 1212.

BRIEF.

ON MOTION TO DISMISS APPEAL AND VACATE SUPERSEDEAS AS TO ALL INTERVENING PETITIONERS IN WHOSE FAVOR SUMS LESS THAN FIVE THOUSAND DOLLARS, ARE SEVERALLY DECREED.

BY JOHN M. BUTLER,

Solicitor for Petitioners.

STATEMENT.

A railroad corporation was organized under the laws of Indiana, called "The Indianapolis, Crawfordsville and Danville Railroad Company," with authority to locate, construct, and operate a line of railroad from Indianapolis to the western boundary line of the State of Indiana, in the direction of Danville, in the State of Illinois.

A railroad corporation was organized under the laws of Illinois, called "The Danville, Urbana, Bloomington and Pekin Railroad Company," with authority to locate, construct, and operate a line of railroad from the city of Pekin to eastern boundary line of the State of Illinois, by way of Urbana, Bloomington, and Danville, in said State of Illinois.

April 1, A. D., 1869. The Danville, Urbana, Bloomington and Pekin Railroad Company executed and delivered to "The Farmers' Loan and Trust Company"—a corporation organized under the laws of New York—a trust deed or mortgage, conveying the property and franchises, etc., etc., to secure an issue of bonds amounting to two million dollars, ($2,000,000.)

July 12, A. D., 1869. The Indianapolis, Crawfordsville and Danville Railroad Company, and The Danville, Urbana, Bloomington and Pekin Railroad Company were consolidated, and became one corporation, under the name of "The Indianapolis, Bloomington and Western Railway Company."

October, 1, A. D., 1870. The Indianapolis, Bloomington and Western Railway Company executed and delivered to The Farmers' Loan and Trust Company trustee, a trust deed or mortgage, conveying the entire property and franchises of the consolidated company, to secure an issue of bonds. This was called the I., B. & W. Ry. Co. FIRST

CONSOLIDATED MORTGAGE. Under it bonds were issued to the amount of three million dollars, ($3.000,000.)

October 1, A. D., 1870. The I. B. & W. Ry. Co executed and delivered its *second* trust deed or mortgage upon its entire property and franchises, to secure bonds issued thereunder, to the amount of one million five hundred thousand dollars, ($1,500,000.) William Dennison and Benjamin E. Smith were trustees in this mortgage.

The railway from Indianapolis, Indiana, to Pekin, Illinois, was so far completed as to be opened for travel and traffic about October 1, 1870.

June 28, A. D. 1872. The I., B. & W. Ry. Co. purchased a projected line of railroad, then in process of construction, extending from Champaign, Illinois, by way of White Heath, Lincoln, Mason City and Havana, westwardly to the Mississippi river, with a branch extending from White Heath to Decatur, all in said State of Illinois, and then known as the "Havana, Mason City, Lincoln & Eastern Railway."

For the purpose of completing the construction of this purchased line, and furnishing it an equipment, the I., B. & W. Ry. Co., on the day of the purchase, executed and delivered to William Dennison and Robert Turner, trustees, a trust deed or mortgage conveying the property thus acquired by the purchase, and all subsequent extensions of the same, to secure an issue of bonds amounting to five million five hundred thousand dollars ($5,500,000).

These bonds were all either sold for value, or hypothecated to secure loans of money, very soon after the date of their issue. The purchased line was constructed from Champaign as far west as Havana and no further. The branch from White Heath to Decatur was also constructed.

The purchased line, so far as the same has ever been constructed, was so far completed as to be opened for traffic some time in the summer of 1873.

All of the bonds issued under the several mortgages, as herein above stated, were negotiated and disposed of by the railway company soon after their date.

The line of the I., B. & W. Ry. extending from Indianapolis to Pekin, is, throughout the legal proceedings, called and known as the "MAIN LINE." The purchased line, extending from Champaign, by way of White Heath, to Havana, and from White Heath to Decatur, is called the "EXTENSION." The length of the Main Line is 202.3 miles, exclusive of sidings. The length of the Extension is 131.6 miles, exclusive of sidings.

In order to form connections with western trunk lines, the I., B. & W. Ry. Co., when its Main Line was opened, leased a line of railway extending from Pekin to Peoria, Illinois.

The length of this leased line, exclusive of sidings, is 9. 2 miles.

From the time the Main Line was opened—October, 1870—it did a very heavy business for a new line, but was far from being completed in its construction. Much right of way remained unpaid for; station houses, water stations, side tracks, fences, ballast and permanent bridges were needed, while payment of interest on Main Line Bonds called for $470,000 each year, $350,000 of which was payable in gold coin, and $120,000 in currency. The Extension Bonds furnished more than all the money that was ever expended in the construction of the extension, and in payment of interest on the Extension Bonds.

In the struggle to pay interest, and complete and pay for the railway and property, labor and supply claims, and equipment rentals were gradually pushed to the rear, until, when the collapse came, large amounts remained due for labor, supplies and rent of cars, which had produced the earnings of the company.

The company defaulted in payment of interest on the I., B. & W. Ry. Co.'s Second Consolidated Mortgage Bonds, and on the Extension Bonds on July 1, 1874. Default in payment of interest on the Danville, Urbana, Bloomington and Pekin Mortgage Bonds, and the I., B. & W. Ry. Co.'s First Consolidated Mortgage Bonds occurred October 1, 1874.

On November 18, 1874, bills were filed by Malcolm C. Turner and others, doing business under the firm name of "Turner Brothers," of the City of New York, claiming as bondholders and general creditors of the I., B. & W. Ry. Co., in the DeWitt County Circuit Court of Illinois, and in the Montgomery County Circuit Court of Indiana, praying for an accounting as to debts, liens and priorities of creditors, and for a foreclosure of all the mortgages on the property of the company, and for the appointment of a receiver. Under these bills George B. Wright was appointed receiver, and took possession of the entire property on December 1, 1874.

The order appointing the receiver provided and directed that out of the earnings of the property the receiver should pay: first, current operating expenses, dues to connecting lines on interchange of business, and taxes; "next, all amounts due to operatives and employes of said railroad for services rendered said railroad since the 1st day of July, 1874; next, all amounts due for supplies used in operating said road, and furnished since the said 1st day of July last." [Record, p. 73.]

Thus providing for the payment of all labor and supply claims accrued within *five months* next prior to the date the receiver took possession.

This order was made at the time the legal proceedings were instituted, before the trustees of the different mortgages had appeared to the suit and become parties to the record, and was of course without the consent of the trus-

tees of the mortgages, *but it was afterwards consented to by the trustees of the several mortgages.*

After the Farmers' Loan and Trust Company, trustee in the D. U. B. & P. R. R. Co., first mortgage for $2,000,000, and in the I. B. & W. Ry. Co., first consolidated mortgage for $3,000,000—thus representing $5,000,000 Main Line Bonds—had filed its answer and cross-bill, to-wit: February 2, 1875, it, *on its own motion,* procured the following order to be entered in the Illinois court, viz: "The Farmers' Loan and Trust Company having applied to me for an order that said receiver be retained for benefit of said Farmers' Loan and Trust Company, it is hereby, therefore, ordered that the receiver now in charge of said property retain the custody of the same for the benefit of said Farmers' Loan and Trust Company, as well as all parties interested in this suit, until the further order of this court. *But this order is not to modify the terms of the order already made in the application and paying out of money.*" [Record, p. 90, bottom.]

Afterwards, on April 7, 1875, and while the trustees of all the Main Line mortgages were parties to the record by answer and cross-bill, and after they had, upon their own motion, extended the receivership to their cross-suit, the following order was entered in open court, all parties being present by their solicitors, without objection or exception, namely:

"The provisions of a previous order of court restricting the receiver to the payment of wages due operatives and employes for services rendered the road and amounts due for supplies used in operating the road since July 1, 1874, are so modified as to place both classes of claims for services rendered and supplies furnished, *prior* to July 1, 1874, on the same basis with claims *subsequent* to July 1, 1874." (Record, p. 91.) This order, taken in connection with the order appointing the receiver, and the order above

quoted extending the receivership to the cross-suit of The Farmers' Loan and Trust Company, provides squarely—*and by consent of the trustees*—for the payment of ALL *claims for labor and supplies* accrued prior to the appointment of the receiver.

These orders have never been changed or annulled by the court.

On December 7, 1875, a further order was entered in open court reaffirming the order of April 7, 1875, above quoted, and directing the receiver to include "all back pay rolls, or certificates, or vouchers for labor, and that all such payments be made *pro rata* upon all amounts due." (Record, p. 93.)

The record fails to show any objection or exception to any of these orders upon the part of the Farmers' Loan and Trust Company, trustee, or upon the part of the trustees in any of the mortgages. On the contrary, the record shows that these orders were *consent orders*—made and entered in open court and in the presence of all the parties.

Under these orders the receiver made one payment of *ten per cent.* on back pay-rolls and vouchers for labor and supplies, but extensive improvements, additions and betterments to the railway and equipment, made by the receiver, absorbed the earnings of the receivership and prevented further payment from that source.

During the long struggle by the company to keep its interest paid, and at the same time make such additions, improvements, sidings, water stations, station houses, etc., etc., as were absolutely essential to enable the company to do the business offered, the main track and the equipment were badly neglected and permitted to go without ordinary care and repair, to such an extent that the Main Line was in a dilapidated and dangerous condition when the receiver took possession in December, 1874. The receiver could do but little in the way of thorough improvement and repair dur-

ing that winter, hence, the spring of 1875 found the Main Line in a very bad and dangerous condition, imperatively demanding instant extensive and expensive extraordinary repairs and improvements. In addition to these expenditures, persons along the line to whom money was due for right of way and depot grounds, began to press for payment. The affidavits of the General Superintendent and Chief Engineer, appended to the receiver's first report to the court, filed March 19, 1875; the statement of the receiver in said report; the statement of the receiver in his second report to the court filed September, 1875, and the statement of the receiver in his first annual report to the court filed December 7, 1875, will give this court some conception of the condition of the I., B. & W. Main Line when it went into possession of the receiver. [Record, pp. 530, 531, 525, 532, 533, 543, 545, and Exhibit B 1, end of p. 554.]

Under the order of appointment, the receiver was authorized "to make such repairs and additions to said railroad and property as may be essential to the safety of the same, and proper, in his judgment, for carrying on its business."

At the March term of the court, A. D. 1875, an order was entered authorizing the receiver to purchase 3,000 tons of iron or steel rails, which order is set out in the receiver's first annual report. [Record, p. 561.] But before this order was made the receiver had purchased $50,000 worth of steel rails and material, which had to be paid for out of current receipts, as is shown by receiver's first annual report. [Record, p. 544.]

On July 7, 1875, on motion of the Farmer's Loan and Trust Company, the receiver was ordered to anticipate the earnings by issuing receiver's certificates to the amount of $211,000, to pay for new rails, splices, bolts, and right of way. [Record, p. 92.]

The amount needed for new ties and material for repairs to road, bridges, machinery and cars, aside from new rails

and the extra labor required to place this large amount of new rails in the track, and new side tracks, and to make the needed repairs to bridges and machinery, made the necessary expenditures of the receiver for *extraordinary repairs, improvements and right of way*, during the first year of the receivership, amount to $430,878.58, all of which was expended upon the Main Line, excepting $7,179.18, as is shown by the receiver's first annual report. [Record, exhibits B 1 and B 2, at end of p. 554.]

In December 1875, by agreement of counsel for Farmers' Loan and Trust Company, and counsel for all the trustees and parties in interest in the several mortgages the receiver was authorized, by order of court, to negotiate for the purchase of engines and freight cars. [Record p. 94.] From the time the Main Line was opened about two-thirds of all its freight cars had been, and still were, rented cars belonging to the Western Car Company. Out of a total equipment of 1,842 freight cars of all kinds, 1,175 cars were rented from the Western Car Company. Under this and subsequent orders the receiver purchased one or two engines and 500 freight cars. Improvement of the property continued. By the close of the second year of the receivership the receiver had expended in extraordinary repairs to track and machinery, and for new sidings, ballasting, fencing, new round houses, new station houses, new shop, new equipment and right of way not less than $500,000, all of which was expended on and in behalf of the Main Line excepting about $11,000, which was expended on the Extension. An examination of the receiver's second annual report, filed in January, 1877, will show the character of these improvements and betterments. [Record pp. 569, 570, 580, 581, 582.]

In April or May, A. D., 1876, the suits in the State Courts were removed into the Circuit Courts of the United States for the District of Indiana and the Southern Dis-

trict of Illinois, upon petition of the Farmers' Loan and Trust Company, George B. Wright continuing as receiver under the United States Courts, the same as he had been under the State Courts. No change whatever was made in the orders of the State Courts relating to the receivership. On July 19, 1876, the Farmers' Loan and Trust Company filed in the United States Court the following motion, viz:

"And now comes the Farmers' Loan and Trust Company, complainant in the cross bill filed in this cause, and moves the court for an order vacating the several orders heretofore entered in this cause in respect to the payment of claims for supplies and other operating expenses, and that this court do make such orders in that behalf as are just and equitable.

THE FARMERS' LOAN AND TRUST COMPANY.
By Williams, Burr & Capen, its Solicitors."

The above motion is quoted exactly from the record of the cause in the United States District Court for the Southern District of Illinois. On getting the printed record, I find that it is not in the record, but a similar motion, leaving out parts of the above quoted motion, is in the record. [Record, p. 156.]

This motion was never presented to the court for consideration and decision, and was never ruled upon by the the court. Without ever asking to have the motion ruled upon, the Farmers' Loan and Trust Company asked and obtained final decree of foreclosure and order of sale, and under said final decree, sold the entire Main Line of the railway. This action, of course, *waived the above motion, and left the former orders in full force.*

In May, 1877, a hearing upon a number of intervening petitions filed in the cause, was had before Judge Drummond. Upon this hearing it was decreed that the EXTENSION should be severed from the MAIN LINE, and that the foreclosure proceedings against the respective lines should

thereafter be distinct and separate. A short time after this hearing, and as one of its results, an agreement was entered into, setting apart to the Extension $\frac{6}{46}$ of the engines and cars belonging to the company as the Extension's share of the equipment, which distribution was set out in the final decree. [Record, p. 223.]

At this hearing, in May, 1877, the court, in an oral opinion upon the various questions argued, among other things, said: "I will allow for all labor and supplies that were furnished, provided, of course, that they were reasonable and the price was reasonable. I will allow for all labor and supplies furnished within the rule that I have established"—(referring to the *six months rule*). Attention is called to this statement of the court—no order or decree was then made by the court—to show that long before any decree of foreclosure was entered all the parties well knew that the court would decree payment for labor, supplies and material furnished within six months prior to the receivership, whenever the just amounts so due were legally ascertained.

On June 4, 1877, as a result of the hearing before the court, above referred to, an order was entered referring all intervening petitions for payment for labor, supplies and materials furnished prior to the receivership, that were then filed, and that might thereafter be filed, to John D. Howland and Livingston Howland, as special masters, directing said masters, "To ascertain and report to the court the evidence, together with their findings thereon, touching the true and just amount due upon each claim or petition presented to the receiver, or to the court, for payment for labor, supplies and operating expenses performed for and furnished to said Indianapolis, Bloomington and Western Railway Company, between the first day of June, A. D., 1874, and the date of the commencement of said receivership; provided that each claim or petition so pre-

sented to the receiver, or to the court, shall state the exact date the indebtedness accrued, what the indebtedness accrued for, where the indebtedness accrued, and what amount thereof remains unpaid, and the claimant or petitioner shall make affidavit to the correctness of his said claim or petition." The order contained several clauses giving specific direction to the masters as to certain intervening petitions, but the clause above quoted is the general clause under which all the claims, except those specifically named in other clauses of the order, were presented and proved. The entire order is set out in the record. [Record, pp. 208, 209.]

Under this order many hundreds of intervening petitions were presented to the special masters, much evidence was taken, and after full consideration the said masters reported to the court, making to the several claimants the several allowances set forth in the decree of October 31, 1881, with the exception of two or three claims that were slightly reduced by the court upon argument of exceptions to said masters reports, which reductions are noted in said decree.

The reports of the special masters upon these several intervening petitions were filed in court between November 1, 1877 and March 1, 1878. [Record pp. 230, 232, 242, 286.]

It should be here stated that previous to the removal of the suit from the State courts, the trustees of the I. B. & W. R. Ry. Co. SECOND CONSOLIDATED MORTGAGE by reason of an agreement entered into touching the reorganization after the foreclosure and sale of the Main Line—dismissed their cross bill and by their counsel joined with The Farmers Loan and Trust Company in an amended and supplemental cross-bill. This amended cross-bill was filed April 26, 1876, and from that time forward The Farmers' Loan and Trust Company was the only cross-complainant as to the MAIN LINE.

After the court had announced that back pay and supply bills accrued within six months prior to the receivership would be allowed when ascertained, and while the special masters were engaged in ascertaining and adjudicating the several amounts due for such labor and supplies, under the order of June 4, 1877, on July 24, 1877, The Farmers' Loan and Trust Company asked and obtained a final decree of foreclosure and sale of the MAIN LINE. This first final decree is set out in the Record. [Record, pp. 213 to 224.]

We desire to call particular attention to several of the provisions of this decree in close connection with the history of the litigation up that time as herein above stated.

The 13th clause of this decree provided that the sale should be made SUBJECT TO *all judgments and valid claims for right of way; for taxes, and for the five hundred freight cars purchased by the receiver, "which claims, judgments and taxes and car contracts shall be assumed by the purchaser or purchasers, in addition to the amount of the purchase-money so bid."* THE SALE WAS NOT TO BE SUBJECT TO ANY OTHER CLAIMS.

By the 14th clause it was provided that all of the receiver's debts, excepting the remainder due for the five hundred freight cars, *and all claims for "work, labor, supplies and materials done and furnished during the six months next preceding the first day of December, 1874, in the operation of said Main Line of said railroad,"* SHOULD BE PAID OUT OF THE PURCHASE-MONEY BID AT THE SALE.

The 19th clause provides for the distribution of the proceeds of sale as follows:

1. The costs of suit.

2. Trustees' compensation and expenses, and solicitors' fees.

3. "Out of the surplus, if any, the following amounts, *now here found and adjudged and decreed to be prior and superior to the liens of the said mortgages, to wit:*

"1. Receiver's debts, except as provided in clause 13 above.

"2. The *amounts* due and owing by the Indianapolis, Bloomington and Western Railway Company for work, labor, supplies and material, done and furnished during the six months next preceding the first day of December, 1874, in the operation of said Main Line of said railroad, if any such *amounts* shall be hereafter so found and adjudged to be valid and paramount *claims* as aforesaid; and because the *amounts* of said indebtedness are not and can not be known to the court until the coming in of the report of the special masters heretofore appointed to ascertain the same, and make report thereof to this court, the said reference is hereby approved and continued; but such reference shall in no wise abridge or impair the right of any of the parties hereto to prosecute an appeal from any order or orders of this court allowing or disallowing said *claims*, or any part thereof, and declaring the same to be prior and superior to said mortgages."

Attention is called to the fact that throughout this provision of the decree these claims are treated and held to be *several, and not joint.*

The 20th clause of the decree contains this important and binding provision, to-wit:

"And it is further ordered that any of the *parties to this action* may apply to the court for such other or further directions at the foot of this decree as may be necessary to carry it into effect, *no other question being reserved except the question as to the amount of the claims or sums of money to be allowed as provided in the fourteenth clause of this decree; and so far as the same shall be passed upon by the court, such allowance or disallowance* SHALL TAKE EFFECT AS IF NOW INCORPORATED IN AND PASSED UPON BY THIS DECREE."

It seems very clear, from these provisions just quoted, that the final decree of July 18, 1877, prepared by, and en-

tered by consent and request of, The Farmers' Loan and Trust Company, *fixed and determined the rights and priorities of the claims of these intervening petitioners.* It solemnly adjudged and decreed them "*to be prior and superior to the liens of the said mortgages,*" and provided for their payment, when their several amounts were ascertained, out of the purchase money bid for the property, *before* anything should be distributed from said proceeds of sale to the bondholders. It only left undetermined the several amounts due to the several intervening petitioners, expressly declared that *no other question was reserved,* and even as to this reserved question, provided that the allowance of the claims, when made, "*shall take effect as if now incorporated in and passed upon by this decree.*"

The Farmers' Loan and Trust Company is most certainly bound by these provisions of a decree asked for by it, and rendered by its consent.

While this decree was in full force, and before any steps had been taken towards its execution, the special masters, Howland and Howland, filed their reports allowing the thirteen hundred and sixteen several claims mentioned in the decree of October 31, 1881, and rejecting many other claims not mentioned in said decree. After the several amounts due to intervening petitioners had been thus ascertained by the special masters and reported to the court, and while exceptions to said masters' reports were pending and undetermined, the Farmers' Loan and Trust Company, by its solicitors, moved the court for, and obtained, an important modification of the final decree of July 18, 1877. This modification was procured and entered May 8, 1878. [Record pp. 304, 305.]

By this modification the 13th and 14th articles, and the second subdivision of the 3d clause of the 19th article, of the original decree were abrogated and rendered null, and a

new 13th clause takes their place. The material part of this new 13th clause reads as follows:

"13. That said sale be made subject to judgments for right of way, and to all legal and valid claims therefor, and also subject to all sums legally due for taxes, which are a lien prior to said mortgages, and also subject to the provisions of certain contracts of lease and purchase heretofore made with Oliver Adams, for five hundred box freight cars by said receiver; and ALSO SUBJECT TO that portion of such other claims and sums of money as are now under consideration by, and as shall be hereafter allowed by this court, or the Circuit Court of the United States for the District of Indiana, in the causes pending therein, and affirmed by the Supreme Court of the United States on appeal, should an appeal be taken, in preference to liens of the hereinbefore mentioned mortgages or deeds of trust, for debts due by said railway company for work and labor done, and supplies and material furnished during a period not exceeding the six months next preceding the first day of December, 1874, in the operation of that portion of the said railroad hereby directed to be sold, without prejudice to the right of the Farmer's Loan and Trust Company to object to the same, and to appeal from any order or orders which may be hereafter made by the court in relation thereto: *Which claims, judgments and taxes, and car contracts, and such back pay, labor and supply claims as shall be finally adjudged against the property herein directed to be sold, after any appeal so taken, shall be assumed by the purchaser or purchasers,* IN ADDITION TO THE AMOUNT OF THE PURCHASE MONEY SO BID."

This modification does not change or abrogate the parts of the 19th and 20th clauses of the original decree herein above quoted, except that instead of distributing the *proceeds of sale* to payment of these claims *before* anything is paid to the bondholders, as provided in 19th clause of de-

cree, *the priority of these claims over the mortgage is preserved and rendered absolute, by making the sale on foreclosure of the mortgages subject to these claims.*

It does materially change the decree, however, by taking out of it the original 13th and 14th clauses and inserting in their stead this new 13th clause, the most material part of which is above quoted.

Therefore, as the final decree now stands, the parts of it that affect the claims for labor and supplies accrued within six months next preceding the receivership are the *new 13th clause* and the 19th and 20th clauses of the original decree. These three clauses *fix and determine finally the status, rights and priorities of these claims.*

1. The railway property was to be sold *subject to* each and all of these claims that should thereafter be allowed by the court.

The Farmers' Loan and Trust Company withdrew from further contest against these claimants, and agreed, by this decree, to accept for its bondholders just what the property would bring at public sale, *subject to these claims.*

The purchasers under this decree were to bid just what they were willing to pay for the property, *and take the risk of paying these several claims.* By the terms of the decree THEY WERE TO PAY THEIR BID IN ANY EVENT, and "*in addition to the amount of the purchase money so bid*" were to assume and pay "such back pay, labor and supply claims as shall be finally adjudged against the property herein directed to be sold." [New 13th clause of decree, Record, p. 304.]

2. These claims were "*adjudged and decreed to be prior and superior to the liens of the said mortgages.*" [19th clause of decree, Record, p. 221.]

3. The only question reserved was "the question as to the amount of the *claims or sums* of money to be allowed" to these intervening petitioners, and when allowed by the

court, the allowances "shall take effect as if now incorporated in and passed upon by this decree." [20th clause of decree, Record, p. 223.]

This decree, as it now stands, was rendered nearly four years ago. The Farmers' Loan and Trust Company procured it, approved it, and sold the property under it, without seeking or taking any appeal from it. No appeal was prayed by any trustee or bondholder. It was an appealable decree, and most certainly determined the rights and priorities of those who were then parties to the suit in which it was rendered.

With the provisions of this final decree in view it seems perfectly evident that the Farmers' Loan and Trust Company has no right to appeal from any subsequent orders or decrees determining the amounts, and directing the payment of these several claims. It has no possible interest in the result of any such appeals. If the claims are paid it loses no dollar from the purchase money bid at its own sale by reason of their payment. If the claims were defeated it would not gain a single dollar for its bondholders over and above the purchase money bid at the sale. The purchasers are the only persons who can gain by defeat, or lose by payment of these claims, and they bought the property in the face of a decree that decreed that the sale should be subject to these claims; that these claims were prior and superior to the liens of the mortgages; and that only reserved the question as to the amounts that might be adjudged due on these several claims.

Under this decree, without further modification, the Main Line was sold on October 30, 1878, at public sale. The highest amount bid at the sale was one million dollars. The purchasers were "Austin Corbin, Giles E. Taintor and Josiah B. Blossom, purchasing committee in trust for *certain bondholders* under the trusts expressed in a certain agreement dated December 20, 1875, and a supplement thereto dated

July 25, 1878," as is stated in the masters' report of sale. [Record, p. 311.]

THESE PURCHASERS NEVER HAVE REPRESENTED, AND NEVER HAVE CLAIMED TO REPRESENT, ALL OF THE MAIN LINE BONDHOLDERS.

Exceptions were filed to the report of sale. On December 23, 1878, all exceptions were overruled, and the sale to Corbin, Taintor and Blossom, was confirmed. [Record, p. 327.]

On April 12, 1879, these purchasers received their deed, the receivership ended, and the purchasers took possession of the property. Some important papers filed by these purchasers in order to get their deed, and in connection with the order of court, granting the deed, seem to be lost from the files of the court, and do not appear in the record brought to this court. But there is enough in the record to show the following facts, viz.:

1. That these purchasers did not represent of I., B. & W. consolidated first mortgage bonds 191; of D. U. B. & P. first mortgage bonds 86, making $277,000 of bottom Main Line bonds, with accumulated interest, that were not represented by the purchasers. No showing is made as to I., B. & W. second mortgage bonds. [Record, pp. 328, 329.]

2. That distribution of the proceeds of sale was then made to the bondholders, in accordance with the provisions of the final decree, and such distribution was accepted and approved by The Farmers' Loan and Trust Company, in behalf of its bondholders, thus ending the litigation so far as The Farmers' Loan and Trust Company trustee was concerned.

That the deed accepted by these purchasers, and the title conveyed to them, was, and is *subject to the prior and superior lien of these claims.* The deed, after setting out as one of its provisions, all of the material part of the new 13th

clause of the decree, contains, in addition thereto, these words, namely:

"Such back pay, labor and supply claims as shall be finally adjudged against said property hereby conveyed, are hereby expressly assured by the said Austin Corbin, Giles E. Taintor and Josiah B. Blossom, purchasing committee, their successor or successors and assigns, as and for a charge and lien upon the property hereby conveyed prior and superior to any interest or estate hereby vested in them or any of them; also subject to the right and power of the said courts, or either of them, to enforce the payment of the said claims, judgments, taxes, car contracts, back pay, labor and supply claims as shall be ultimately established, or any of them, by proper orders in the said suits to be noted at the foot of said decrees, or otherwise duly entered in the said courts, and particularly subject to the right and power of the said courts, or either of them, upon their own motion, or of any judge thereof, or upon the application of any person in interest to resume possession of the said property, or of any part thereof, at any time when the said purchasers or their assigns shall fail to pay any of the said moneys on the order of the said courts or either of them; and the said Austin Corbin, Giles E. Taintor and Josiah B. Blossom, purchasing committee, for themselves and their successor or successors and assigns, do hereby covenant and agree that they will surrender the possession of the said premises and of every part thereof whenever an order shall be made by either of said courts directing or requiring the same to be done pursuant to the purposes hereinbefore stated, and it is expressly understood that this deed is made and that the said property shall be taken, possessed and held subject to the provisions last above written." [Record, p. 336.] For papers relating to deed to purchasers. [Record, pp. 328 to 338.]

These purchasers, Corbin, Taintor and Blossom, never became parties to the record by petition, or otherwise, prior

to their purchase of the property. If they have ever become parties to the record at all, it is by virtue of their having become *purchasers of the property.* They have no standing in court as *bondholders.* The Farmers' Loan and Trust Company trustee represented the bondholders. The decree merged the bonds and the sale, under the decree, and distribution of proceeds of sale to the bondholders disposed forever of their claims as bondholders. These purchasers stand as strangers to the record up to the time their purchase was confirmed by the court, and the conditions of the their purchase were performed. They are certainly bound by all orders and decrees made and rendered in the cause *prior to their purchase.* If they now possess any rights as parties to the record, their rights are certainly *limited to* the contesting of orders and decrees made and rendered *subsequent to the time they became purchasers.* They are bound by the provision of the final decree, decreeing these claims to be "prior and superior to the liens of the mortgages." They are bound by the provision of the final decree which declares and decrees that *all questions are waived except one only,* and that the only question reserved is as to the amount due on the several claims, and that when the claims are passed upon by the court, "such allowance or disallowance *shall take effect as if now incorporated in and passed upon by this decree.*" All these provisions of the final decree are binding upon these purchasers, and the deed accepted by them clearly shows that they well understood that fact. How they can, under this final decree, and the deed accepted by them, claim the right to appeal to this court from decrees ranging in amount from a few cents up to two or three thousand dollars, is not easily understood.

The receivership continued from December 1, 1874 to April 12, 1879. During this time large earnings were made over and above ordinary operating expenses and repairs.

According to the receiver's last annual report and his supplemental report, the net earnings of the receivership over and above ordinary repairs and operating expenses were not less than $600,000. [Record, pp. 596, 597 and 604.]

While the same reports show that during the receivership the receiver expended in extraordinary repairs to the property, and in additions, improvements, betterments, new equipment and right of way not less than $700,000. The master, William P. Fishback, to whom this question, among others, was referred, finds and reports that the receiver expended for betterments to the property $708,969.40. [Record, p. 412.]

At the close of the receivership the indebtedness of the receiver over and above his available assets was about $362,000, as is shown by the order of court granting the deed to the purchasers. [Record, p. 333.]

This indebtedness arose from several causes.

1. The receiver expended *more than all of his net earnings* in improvements to the property. The figures above given from receiver's reports show this fact.

2. The supplies and materials on hand and in store for use in operating the road, turned over by the receiver to the purchasers when the receivership closed, were vastly more valuable than the supplies and material on hand when the receiver took possession of the property in 1874. This increased stock of supplies and material caused a large part of the indebtedness of the receiver at the close of the receivership.

3. Besides the improvements and extraordinary repairs to the property, the receiver paid out large sums of money for *taxes accrued on the property prior to the receivership* and for *dues from the old company to connecting lines, and leased lines and terminal facilities.*

The above three items will account for substantially all

of the receiver's indebtedness at the close of the receivership. On account of making these payments and expenditures, in addition to the vast amount expended in improving and repairing the property, the close of the receivership found the receiver in debt over his available assets the above amount. Under the terms of the final decree rendered at request of the Farmers' Loan and Trust Company, this receiver's debt was paid out of the proceeds of sale, or reserved to be so applied, before distribution to the bondholders was made.

On September 3, 1877, final decree of foreclosure and sale of EXTENSION part of the I., B. & W. Railway was rendered and entered in the United States Circuit Court for the Southern District of Illinois. This decree was modified by a supplemental decree rendered May 11, 1878.

The Extension was sold February 6, 1879; the sale was confirmed March 31, 1879, and deed granted to purchasers by order of court entered May 9, 1879.

The sale of the Extension was also made *subject to* such portion of these claims for labor and supplies as the court should thereafter adjudge against the Extension. The Main Line and Extension decrees are substantially the same as to the provisions touching these labor and supply claims. The decree and papers relating to sale of the Extension are in the record. [Record, pp. 224, 305, 327, 339.]

In January, 1879, a stipulation was entered into between the purchasers of the Main Line and the cross-complainants in the Extension foreclosure proceedings, providing the manner in which the payment of these labor and supply claims, when determined, should be apportioned between the Main Line and the Extension. This stipulation is in the record. [Record, pp. 376 to 379.]

After this court rendered its decision in *Fosdick vs. Schall*—in which case an opinion of Judge Drummond in the I., B. & W. Ry. Co. case was filed in this court, in

connection with our brief—Judge Drummond entered an order in the I., B. & W. Ry. Co. case referring certain questions to W. P. Fishback, master, to take evidence and report the same to court with his findings of facts. This order was entered February 18, 1880. It is set out in the record. [Record, pp. 361, 362.] This order, in substance, directed the master to find the following facts:

1. The amount of money expended by the company in payment of interest on bonds, and for permanent improvements, betterments, right of way or other real estate, new equipment, and for construction, between the first day of January, 1873, and the first day of December, 1874, and from what source the funds were obtained.

2. The amount expended by the receiver during the entire receivership, in permanent improvements, right of way, or other real estate, new equipment, or for construction, and from what source the funds were obtained. The master to discriminate between "mere operating expenses" and "permanent improvements, or betterments, or equipments of the road."

3. The gross earnings of the road from January 1, 1873, to April 12, 1879, separating earnings of company from earnings of receiver, "and what remained after deducting from these gross earnings, if any thing, for necessary operating expenses, proper equipment and useful improvements." Also the property received by receiver on December 1, 1874, and what property of like character was surrendered by the receiver to the purchasers.

Under this order a vast amount of evidence was taken. On May 18, 1881, Master Fishback filed his report. By this report the master finds that the gross earnings of the railway from January 1, 1873, to April 12, 1879, were sufficient to have paid all operating expenses, INCLUDING ALL THESE LABOR AND SUPPLY AND RENTAL CLAIMS, leaving a surplus of earnings of $718,761.51 [Record, p. 416.]

He further finds that the amount paid out by the company for INTEREST on bonds between January 1, 1873, and December 1, 1874, is $958,098.91. [Record, p. 401.] He finds the amount actually paid out by the company for CONSTRUCTION AND EQUIPMENT, between January 1, 1873, and December 1, 1874 to be $889,064.70. [Record, p. 405.]

He further finds, that the receiver expended in extraordinary repairs, improvements, right of way, new equipment, and construction, $708,969.40. [Record, p. 412.]

The master further finds, that all these payments made by the company were derived from: 1. Earnings. 2. Sale of Extension bonds. 3. Borrowed money; the funds from all three sources going indiscriminately into the common treasury. [Record, p. 403.]

Exceptions were filed to this report, which are set out in the record. [Record, pp. 430 to 440.]

In October, 1881, a general and final hearing was had upon the various exceptions to the reports of the special masters Howland and Howland determining and allowing the several amounts due for labor, supplies and materials performed and furnished during the *six months* next preceding the appointment of the receiver, upon the several intervening petitions presented to said special masters under the order of June 4, 1877, and also upon the exceptions to the report of Master Fishback made under the order of February 18, 1880. On October 31, 1881, the court rendered the decree from which this appeal is taken. This decree is set out in full in the record. [Record, pp. 449 to 499.] An examination of this decree will demonstrate the following facts, viz:

1. It is not a single or joint decree, but is in fact *thirteen hundred and sixteen separate and several decrees*, each one of which is independent of all the others, and was ren-

dered upon a distinct, separate and several petition and the testimony introduced thereunder.

2. That no one of said several decrees is based upon, or necessarily dependent upon, the finding of the court complained of by these appellants.

3. That no one of said several decrees is rendered against the Farmers' Loan and Trust Company, or in any way affects its rights and interests as trustee in the mortgages upon which the Main Line was sold.

4. That of the eleven hundred and sixty-three decrees against the purchasers of the Main Line, eleven hundred and forty-nine decrees are each for a sum less than five thousand dollars.

5. That the court finds that between January 1, 1873, and and April 12, 1879, "the earnings of said Indianapolis, Bloomington and Western Railway, that ought to have been applied to the payment of the several claims hereinafter referred to (these labor and supply claims) were diverted to the payment of interest upon the bonded indebtedness of said Railway Company, additional equipment purchased for, and lasting and valuable improvements made upon said railway to the amount of *five hundred and eighty-seven thousand dollars*," while the aggregate of the amounts allowed and decreed against both the Main Line and Extension in said several decrees is only $486,923.36.

6. That this several decree of October 31, 1881, is simply a foot-note to, and an order carrying into execution the provisions of the final decrees rendered nearly four years ago; *that it determines no right or priority, not determined and decreed in the said final decrees;* that it only determines and decrees the *several amounts due* to said several intervening petitioners in accordance with the provisions and directions of said final decrees; that it is based upon said *final decrees and the various orders of the court rendered and entered in the cause,* as well as upon the facts found and reported by

Masters Howland and Howland, and Master Fishback, and that these several decrees are rendered against Austin Corbin, Giles E. Taintor and Josiah B. Blossom, AS PURCHASERS, and are for "money which the said purchasers are obliged to pay under the decree and various orders of the court rendered and entered heretofore in this cause"—to all of which decrees and orders these purchasers agreed and consented when they purchased the property.

7. That the only objection and exception to these decrees, stated by appellants, is an exception to one of the several findings of the court, which finding is not part of any decree, and from which no appeal can be taken. [Record, pp. 498, 499.]

The aggregate amount of these several decrees rendered against the purchasers of the Extension is $68,470.96.

The aggregate amount of these several decrees rendered against the purchasers of the Main Line is $418,552.40.

The Extension purchasers have paid in full all of the several decrees rendered against them. [Record, pp. 482, 497.]

Over the protest of the intervening petitioners, the court granted a joint appeal and *supersedeas*, superseding the execution of all of the several decrees against the purchasers of theMain Line.

In behalf of eleven hundred and forty-nine several intervening petitioners, in whose favor, severally, decrees were rendered against the purchasers of the Main Line as set out in the general decree or order of October 31, 1881, the several motion filed herewith is submitted. The motion is to dismiss the appeal, and vacate the supersedeas, *as to each*, severally, of said several intervening petitioners named in said motion, on the grounds therein stated. Fourteen intervening petitioners, in whose favor decrees were rendered against the Main Line purchasers, are omitted from this

motion, because the several decrees in their favor were each for a sum exceeding five thousand dollars exclusive of costs.

The eleven hundred and forty-nine separate intervening petitions filed by the claimants named in the motion to dismiss appeal and vacate supersedeas, are not set out in the record. In order to shorten the record and save expense, they were omitted by stipulation. [Record, pp. 195, 196.]

By this stipulation appellants agree of record that these claimants "filed their several and separate petitions with the masters or the receiver in conformity with the requirements or provisions of the order of reference of June 4, 1877, and the extensions or modifications thereof," and "that the said several intervening petitions were for claims for supplies and materials severally furnished by said several intervening petitioners to the Indianapolis, Bloomington and Western Railway Company within the period of six months next preceding the first day of December, 1874, and which were used by said company in the operation of its said railway, and were for labor performed for said company in the operation of its said railway by said respective claimants, severally, during the said period of six months above named."

No question or objection whatever is raised, or presented, by the appellants, *as to the several amounts decreed, severally, to the claimants named in this motion.*

The supersedeas was granted by the court below December 31, 1881.

The record was filed and docketed in this court March 23, 1882.

The several intervening petitioners named in this motion are not named in the record as parties to the cause. In appellants' petition for supersedeas and prayer for appeal, they are not named or treated as parties to the record. They are not named on the docket of this court, or in the title or record of this cause, in this court, as appellees.

ARGUMENT.

The following reasons are assigned in the motion:

I.

BECAUSE THE AMOUNT DECREED SEVERALLY IN FAVOR OF EACH OF SAID SEVERAL INTERVENING PETITIONERS, HEREIN ABOVE NAMED, DOES NOT "EXCEED THE SUM OR VALUE OF FIVE THOUSAND DOLLARS, EXCLUSIVE OF COSTS," AND THEREFORE THIS COURT HAS NOT JURISDICTION TO HEAR AND DETERMINE APPEALS FROM SAID SEVERAL DECREES.

A fair consideration of this reason requires, in the first place, an investigation of two questions, viz: Between whom is there a controversy? and, what is the controversy about?—Answering these questions *negatively* we submit,

1. There is no controversy between the Farmers' Loan and Trust Company trustee, and these claimants, or any or either of them. That controversy ended in 1878, when the trustee, representing all the bondholders, asked the court for, and obtained, a decree decreeing the several claims of these claimants to be prior and superior to the liens of the mortgages, and decreeing that the property should be sold subject to these several claims. If the controversy did not end then, it most certainly did end when, under that decree, the trustee procured the sale to be made subject to these several claims, *and distributed the proceeds of sale to itself, its solicitors, and its bondholders.*

2. There is no controversy between the *bondholders* and these claimants, or any or either of them. The record shows that the trustee represented and acted for the bondholders throughout the proceedings and until the proceeds of the sale were distributed to the bondholders.

3. There is no controversy about the *proceeds of sale* de-

rived from the sale of the property under the decree of foreclosure. The record shows that the proceeds of that sale were one million dollars, *not one dollar of which can ever be applied to the payment of any of these claims.* Those proceeds of sale have been distributed in strict accordance with the provisions of the decree.

4. There is no controversy between the PURCHASERS and these claimants, or any or either of them, *over a fund in the court, or over a fixed and single fund to be paid into court.* There is no fund in court that can be the subject of controversy between these purchasers and any one of these claimants. Under the decree of sale no *general fund* can be asked from, or ordered paid into court by, these purchasers. The record conclusively proves these facts.

5. There is no controversy between the purchasers, on the one side, and *all of these claimants* JOINTLY on the other side. The final decree, the order of sale, the order of court granting a deed to the purchasers and the deed approved and accepted by the purchasers, all prove conclusively that no such controversy can exist.

Answering the above questions *positively* we submit:

1. The controversy is between Austin Corbin, Giles E. Taintor and Josiah B. Blossom, *as* PURCHASERS, *and each one of these intervening petitioners, separately and* SEVERALLY. After these purchasers had paid their bid of one million dollars in cash, and such bonds and coupons as they controlled, they were done with the trustee representing the bondholders, and with the decree of the court, so far as it affected the rights and interests of the trustee, and the trustee was done with them, and with the litigation. When the purchasers took their deed they became the owners of the property, *subject only to each severally, of the claims of the several intervening petitioners, each* of which claims, *severally*, they expressly assumed and agreed to pay, when finally adjudicated, "as and for a charge and lien upon the

property hereby conveyed PRIOR *and* SUPERIOR to any interest or estate hereby vested in them." So says the deed approved and accepted by these purchasers. [Record p. 336.]

2. The controversy is over, and about, *the separate and several* AMOUNT *found and decreed due upon each,* SEVERALLY, *of the several intervening petitions,* AND NOTHING ELSE. By the terms and provisions of the decree, order of sale, and deed, no other question can now be raised by these purchasers. The final decree, rendered nearly four years ago and never appealed from, recognized the existence of these several claims, and *decreed that they are prior and superior to the lien of the mortgages,* and so decreeing, provided that the property should be sold *subject to them*—thus forever establishing their priority and providing absolute security for their payment. The *only question* left undetermined and unadjudicated by the decree was, and is, the *amount due upon each of these claims.* The deed accepted and approved by the purchasers reaffirmed these provisions of the final decree.

3. It is self-evident, from the record of this litigation, that these claims, subject to which the property was sold, *are several, and in no sense joint.* Each claim stands, or falls, upon its own independent facts and pleadings. The fact that there are many claims preferred against the same purchasers—each claim being separate and distinct from all others, and resting upon separate and distinct pleadings and evidence—does not make the claimants *joint claimants.* If the purchasers had defeated any one of these claims, such defeat would not have affected any other claim. If a dozen of these claims embraced in this motion had been defeated, the defeated claimants could not have tacked their claims together so as to make the aggregate amount over five thousand dollars, and, upon these joined claims, appealed to this court. The controversy, therefore, being between these purchasers and *each claimant severally,* and being, in

each several claim, a controversy about the *amount due on that claim*, it follows that neither the purchasers nor the claimants can appeal to this court unless the amount involved exceeds five thousand dollars, exclusive of costs.

This view seems to be well supported by authority.

In the case of *Oliver* v. *Alexander*, 6 Peters, 143. Mr. Justice Story, in the course of his opinion, says: "It is obvious that the claim of each seaman is distinct and several; and the decree upon each claim is in like manner distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another; for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter in dispute between him and the owners or other respondents, is the sum or value of his own claim, without any reference to the claims of others. It is very clear, therefore, that no seaman can appeal from the district court to the circuit court, unless his own claim exceeds $50; nor from the circuit court to the supreme court, unless his claim exceeds $2,000. And the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute.

"If the law were otherwise it would operate most unjustly and oppressively; for then the seaman would be compellable to file a joint libel; and, if any controversy existed as to the claim of a single seaman, all the others would be compellable to be dragged before the appellate tribunals, and incur enormous expenses; even when their own rights and claims were beyond all controversy, and in truth were not controverted."

It would be difficult to put into words a more accurate

description of the case of the claimants embraced in this motion. Substitute the words "claimants" for "seaman" and "purchasers" for "owners" and the above quotation would be a perfect description of the rights of the claimants named in this motion, and of the *wrongs* sought to be imposed upon them, by the appeal and supersedeas against which this motion is directed.

In the same case the opinion contains these further statements:

"The amount in controversy being now ascertained by a several decree, that constitutes, in regard to the respondents, the sole matter in dispute between them, and the respective libellants. Neither party can, then, claim an appeal to this court, in regard to the claim of any libellant, unless that claim exceeds $2,000. The case is not distinguishable, in principle, from that of an information of seizure, or a libel on a capture as prize, where various claims are interposed for different portions of the property, by persons claiming the same by distinct and independent titles. In such a case, though the original libel is against the whole property jointly, yet it is severed by the several claims; and no appeal lies by either party, unless in regard to a claim exceeding the sum of $2,000 in value."

In *Stratton* v. *Jarvis and Brown*, 8 Peters 4, this court, by Mr. Justice Story, says: "The first question is, whether this court has jurisdiction to entertain the appeal, the aggregate amount of the whole salvage exceeding the sum of $2,000; but that which is due or payable by any distinct claimant being very far short of that sum. The argument in favor of the jurisdiction is, that the salvage service is entire, and the decree is for a specified portion or aliquot part of the whole of the gross sales; and, therefore, it is chargeable upon the proceeds as an entirety, and not upon the separate parcels thereof, according to the interests of the separate owners. We are of a different opinion. In

the appeal here, as in that from the district court, the case of each claimant having a separate interest must be treated as a separate appeal, *pro interesse suo*, from the decree, so far as it regards that interest; and the salvage chargeable on him constitutes the whole matter in dispute between him and the libellant; with the fate of the other claims, however disposed of, he has and can have nothing to do. * * We are, therefore, of opinion that we have no jurisdiction to entertain the present appeal in regard to any of the claimants; and the cause must, for this reason, be dismissed."

To the same effect are the cases of *Spear* v. *Place*, 11 Howard, 522; *Clifton* v. *Sheldon*, 23 Howard, 481; *Rich* v. *Lambert*, 12 Howard, 347.

In this last case the appeal was dismissed *as to all claimants in whose favor less than $2,000*, which was then the amount required to entitle a party to appeal, now increased to $5,000, *was decreed*, and sustained as to the other claimants. In the opinion, Mr. Justice Nelson says:

"On the part of the appellants, it is contended that the objection to the jurisdiction is not available to the five separate owners joining in the libel, as the aggregate amount decreed to them exceeds $2,000; nor to any of the parties on the ground that all the cases were consolidated by the orders of the district court, on the motion of the proctors for the libellants. * * * Clearly a libellant could not have appealed unless his claim exceed $2,000. Nor can the respondent, upon the same principal, unless the amount decreed against him in the particular case exceeds that sum."

The case of *Seaver* v. *Bigelows*, 5 Wallace, p. 208, decides that the above authorities are applicable to cases in equity as well as in admiralty. This was a case of a creditor's bill. Mr. Justice Nelson, in delivering the opinion of the court, says:

"It is true, the litigation involves a common fund, which exceeds the sum of $2,000, but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases where separate and distinct interests are in dispute of an amount less than the statute requires, and where the joinder of parties is permitted by the mere indulgence of the court, for its convenience, and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law.

"The case is analogous to proceedings in admiralty in behalf of seamen for wages and sailors for salvage, where the practice of the court is well settled. In the case of the seamen, though the contract is separate, and not joint, all may join in the libel and carry on the proceeding in form, jointly, to the decree, which assigns to each *severally* the amount due. If the sum thus assigned is under $2,000, *neither party can appeal.* So in respect to the case of salvage where the amount charged upon the goods of each of the several claimants is less than this sum."*

The cases of *United States* v. *Carr*, 8 Howard 1; *Ross* v. *Prentiss*, 3 Howard 771; and *Terry* v. *Hatch*, 3 Otto 44, are in point here as showing that this court has always guarded with jealous care its jurisdiction, with respect to the amount in controversy.#

In the case of *The Rio Grande*, 19 Wallace 188, the motion to dismiss was denied because it was made to include *all the claimants*, two of whom had decrees for more than $2,000 each, instead of limiting the motion to those only in whose favor less than $2,000 was severally decreed. Mr. Justice Clifford, in the opinion, says, "True, the sums recovered by the other three appellees respectively were not sufficient to give this court jurisdiction; but the motion is to dismiss *the appeal*, which must be denied, as the decree in favor of the two libellants first named in the decree is, as it respects each of those, greater than $2,000."

* The later cases of Parris Co. v Mulford 100 U.S. 145. and Rupert v Stansell No 929. Oct. Term 1881. affirm the cases above cited, and fully establish the position we contend for.

See also Chatfield et al v No 150 Oct Term 188

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The later cases of Parsley Co. v. Mulford 100 U.S. 145. Gulf Rapids R. v. Staunton No 929. Oct. Term 1881. Affirm the cases above cited, and fully establish the position we contend for.

See also Chatfield et al v Boyle et al. No 150 Oct Term 1881.

The motion in this cause is limited to, and made in behalf of, the several intervening petitioners in whose favor sums less than five thousand dollars are severally decreed.

The case of *Shields* v. *Thomas*, 17 Howard 3, is not at all antagonistic to the cases above cited, but is readily distinguishable from those cases, and from the case under discussion. In that case the legal representatives of Goldsberry, holding a *common and undivided interest* in his estate, filed a bill in the Chancery Court of Kentucky, against Shields, charging him with conversion of the property belonging to the estate, and obtained a decree against him for a sum of money much larger than was then required to sustain the jurisdiction of this court on appeal. Shields lived in Iowa, and a portion of the representatives of Goldsberry united in a bill in Iowa to enfore the Kentucky decree. The whole amount recovered in the Iowa litigation exceeded the sum of $2,000, but the part of it allotted to each representative who joined in the bill was less than $2,000.

Chief Justice Taney, in delivering the opinion, says, "But the court think the matter in controversy in the Kentucky court, was the sum due to the representatives of the deceased collectively ; and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point ; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him." How very different that is from the case under consideration. In this case these claimants have no common and undivided interest. They have no joint claim. There is no common fund in contro-

versy. There is no common title upon which all the claims jointly rest. Here each claim is separate and independent of all others. The interest of each is separate. Each claimant's recovery does not depend upon the recovery of others, but rests altogether on its own pleadings, evidence and merits. Here there is no chance for dispute among claimants as to the division of a common fund among themselves. *Here it is material to the purchasers how much each claimant gets.* The *only controversy* is between the purchasers and *each claimant severally*, and is about the *amount each claimant severally is to receive.*

Shields v. *Thomas* is not, therefore, in conflict with the position assumed in this argument, or with the authorities cited in its support.

The case of *Rodd* v. *Heartt*, 17 Wallace, 354, instead of being in conflict with the authorities above cited in support of this motion, will be found to be in strict harmony with them. In that case Rodd and others held a *joint mortgage* upon the property, to secure indebtedness amounting to over $12,000. The proceeds of sale, left as a fund in court to be applied on debts, amounted to only $4,337.51. The claims of mariners and supply and material men amounted to $10,151. The decree of the court *rejected and disallowed the entire mortgage debt*, and distributed the entire fund to the mariners and supply and material men. From this decree, disallowing the mortgage debt, the *joint mortgagees* appealed. Mr. Chief Justice Chase, in deciding the motion to dismiss, says: "It is apparent that, though no one of the claims allowed exceeded $2,000, yet the claim of the appellants, which was disallowed, exceeded that sum." There is not a single feature in common between that case and the case presented by this motion. Here no claim is disallowed to these appellants, the mortgages which the Farmers' Loan and Trust Company held against the railway have been *paid and discharged*, in

accordance with the terms of the final decree asked and prepared, by the trustee, and consented to by it. These purchasers lay no claim to a fund in court; there is no such fund, and if there were, these purchasers could not claim it. They stand here simply as purchasers under a decree which provides that they shall *pay their bid in full discharge of the mortgages*, and that they shall take the property *subject to each of these claims severally, as a separate and several claim against the property purchased.* The only controversy there is, or can be, is a separate and several controversy between these purchasers and each one of these claimants.

The case of *The "Connemara,"* 13 Otto 754, is valuable, and in point here, as clearly stating the principle governing cases of this kind, and giving the rule by which they may be readily distinguished. Mr. Chief Justice Waite, in delivering the opinion, says: "The suit below was by a set of salvors to recover for a single salvage service, and there was but one claim filed for the property saved. The total amount of the recovery was $14,198, but in the division among the several parties entitled to share in the recovery some got less than $5,000. Separate and distinct interests were not united in the suit. The service rendered was the joint service of all the salvors, and the recovery was on that account. It was a matter of no consequence to the owners of the property saved how the money recovered was apportioned among those who had earned it. The owners were decreed to pay the salvors for what they, acting together in a common service had done. In such a suit we think the owners can not be deprived of their appeal, because the court below in the progress of the cause, saw fit to apportion the recovery among the salvors according to their respective merits. The decree is in legal effect, one decree in favor of all the salvors, they having as between themselves, unequal interests.

"In all the cases where we have held that several sums decreed in favor of or against different persons could not be united to give us jurisdiction on appeal, it will be found that the matters in dispute were entirely separate and distinct, and were joined in one suit and to save expense."

After citing *Seaver* v *Bigelows*, *Rich* v. *Lambert*, *Oliver* v. *Alexander*, *and Stratton*. v *Jarvis*, herein above refered to, the opinion proceeds:

"Here, however, the matter in controversy was the amount due the salvors collectively, and not the particular sum to which each was entitled when the amount due was distributed among them. As in *Shields* v. *Thomas* (17 How. 3) they claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellants how it was to be shared among them. If there was any difficulty as to the proportions * * * "the dispute was among themselves."

An application of this authority to the case under consideration demonstrates the fact that this motion is well taken. Here there is no joint suit by a set of claimants for a *single service*, for which *but one claim is filed*. On the contrary, there are many hundreds of suits, each for a separate and distinct service or supply, and each standing upon its own pleadings, evidence and merits. In this case to say that "separate and distinct interests were *not* united in the suit," would be manifestly untrue; on the contrary the record proves conclusively that each claimant's interest is separate and distinct from all others, each being based upon a separate and several contract. It would be equally untrue, in this case, to say that the "service rendered was the *joint service* of all the claimants;" and that a *joint recovery* was obtained. On the contrary the entire record shows that these services were several, and not joint, and that throughout these proceedings each claimant has been made to stand, or fall, upon the merits of *his single claim*, regard-

less of all others, and that the recovery and decree is several. Instead of its being a matter of no importance how the money recovered was apportioned, as was true in that case, the controversy in this case is solely between these purchasers and *each claimant severally*. If they defeat one claim they save that much, but the defeat of that claim in no manner affects the other claims.

It would not be true to say, in this case, that "the decree is, in legal effect, one decree in favor of all the claimants." Such a statement would be in direct conflict with every line of the record touching these claims, from the original order appointing the receiver to the final decrees in favor of these claimants. In that case it is said "here, however, the matter in controversy was the amount due the salvors *collectively*, and not the particular sum to which each was entitled." How widely different that is from this case. Here the matter in controversy is *not* the amount due these claimants, *collectively*, but it *is* the *particular amount* to which *each claimant* is entitled. In this case the final decree provides, that the sale shall be made "subject to that portion of such other *claims* and *sums* of money as are now under consideration by, and as shall be hereafter allowed by this court, * * for *debts* due by said railway company for work and labor done, and supplies and material furnished during a period not exceeding six months, next preceding the first day of December, 1874, * * and such back pay, labor and supply *claims* * * shall be assumed by the purchaser or purchasers." The deed accepted and approved by these purchasers contains these words: "Such back pay, labor and supply *claims* as shall be finally adjudged against said property hereby conveyed, *are* hereby expressly assumed by the said Austin Corbin, Giles E. Taintor and Josiah B. Blossom."

In the objection and exception upon which appellants base this appeal, they admit that these decrees and claims

are several; their language is "objecting and excepting * * to the *orders* and *decrees* for the payment of the *said several claims.*" In view of this record it is surely impossible to hold that the matter in controversy is anything other than the amount due severally to each of these several claimants. In the case of *the* "*Connemara*," the opinion states that "they all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellants how it was to be shared among them. If there was any difficulty as to the proportions, . . . the dispute was among themselves." Not one of these statements can by any possibility be applied to the claimants in the case under consideration. They do not claim under the same title, but each claim rests on its own title, and represents a separate and independent contract and transaction. They have no "common and undivided" interest in any claim, but each is a several claim based upon its own state of facts. No fixed amount or fund is to be shared among these claimants requiring them to settle disputes as to proportions among themselves, but each claimant is severally decreed such an amount as the court found due to him on *his contract*, *his pleadings* and *his proofs*. Hence we see that there is in fact no single point in common between the case of *the* "*Connemara*" and the case in argument. The settled rule announced in that case, in these words, "in all cases where we have held that several sums decreed in favor of or against different persons could *not* be united to give us jurisdiction on appeal, it will be found that the matters in dispute were entirely separate and distinct," covers and describes this case perfectly. The matters in dispute here are entirely distinct and separate, based upon different transactions, different contracts, different pleadings and different proofs.

We therefore submit that upon the facts disclosed by this record, upon reason and upon abundant authority, this

court has not jurisdiction to hear and determine appeals from the several decrees rendered in favor of the several intervening petitioners embraced in this motion, and that the motion to dismiss the appeal, and vacate the supersedeas, as to the several claimants named therein, ought to be sustained.

II.

BECAUSE THE SAID SEVERAL INTERVENING PETITIONS NAMED IN THE MOTION HAVE NOT BEEN NAMED AS EITHER APPELLANTS OR APPELLEES UPON THE DOCKET OF THIS COURT, OR IN THE TRANSCRIPT FILED HEREIN.

The facts applicable to this branch of the motion, as disclosed by the record, are these, viz: The several intervening petitioners named in this motion are not named in the records of the Circuit Court, or in the transcript filed in this court, as parties to the cause.

Under the order of June 4, 1877, they filed their several intervening petitions, and severally introduced before the special masters, Howland and Howland, proof in support of their respective claims. They never have been named, or treated, as parties to the cause in any other sense than simply as interveners permitted by order of Court to file and prove their claims. They have never had any voice or control in the litigation, as parties to the cause.

In appellants' petition for supersedeas they are not named or treated as parties to the record. The supersedeas bond is a bond executed to the Clerk of the United States Circuit Court for the District of Indiana, "for the use and benefit of whom it may concern," and both the bond and the petition for supersedeas are entitled the same as the original bill of Turner Brothers, and the cross-bill of the Farmers' Loan and Trust Company. Not one of the intervening petitions included in the motion is named or entered on the docket of this court, or in the title or record of this cause in this court as an appellee. The fourteen intervening petitions

not included in this motion, and in whose favor sums exceeding five thousand dollars are severally decreed, are named on the docket of this court as appellees.

It is clear from what has already been stated that there is no controversy here between the original parties to the suit. The controversy here is a several controversy between the purchasers and each one of the claimants named in the general decree of October 31, 1881. Hence, each intervening petitioner whose separate and several decree is to be considered, should be named in the record and docketed as an appellee.

There are a number of decisions of this court holding the rule to be inflexible, that the names of all parties whose rights are to be adjudicated must be stated upon the record.

The Proctor, 11 Wallace 82.
Smith v. *Clark*, 12 Howard 21.
Smyth v. *Strader*, 12 Howard 327.
Davenport v. *Fletcher*, 16 Howard 142.

It should be here noted that the act of June 1, 1872—Sections 1005 and 1006 U. S. Revised Statutes—does not change or affect the law as to appeals in the equity cases.

Amendments are by those sections allowed in writs of error and prize cases, but the law as to appeals in equity remains unchanged.

It will not do in cases of this kind to claim that mere intervening petitioners are obliged to follow the appeal to this court, whether named as appellees or not, simply because the appeal was prayed and bond given at the same term the decree was rendered. If any such rule exists, which is very doubtful, it would only apply to *regular parties* to the record below, and would not apply to intervening petitioners who have never been named, or treated, as parties to the suit, or admitted to the record as parties by order of court.

Ex parte Cutting, 4 Otto 14.
Ex parte Jordan, 4 Otto, 248.

III.

BECAUSE SAID APPEALS AND SUPERSEDEAS WERE PRAYED AND GRANTED BY THE COURT BELOW, IN BEHALF OF THE FARMERS' LOAN AND TRUST COMPANY, AS ONE OF THE APPELLANTS: WHICH CORPORATION, AS IS CONCLUSIVELY SHOWN BY THE RECORD, IS NOT A PARTY IN INTEREST IN SAID APPEALS, AND IS NOT IN ANY MANNER INTERESTED IN THE FINAL ISSUE OF SAID APPEALS.

The facts bearing upon this point have been already stated. They are in brief:

1. The Farmers' Loan and Trust Company was trustee in the two mortgages on the Main Line, upon which the foreclosure decree and sale were based.

2. From the time this company, as trustee, filed its cross bill and procured the receivership to be extended to its cross suit, it took and retained full control of the litigation as against Main Line, up to final decree and sale and distribution of the proceeds of sale.

3. It prepared and procured the final decree, and the modification thereof, under which the sale was made. *That final decree determined and finally adjudicated the rights and interests of the trustee in the property.*

4. By its own decree it asked the court to sell the Main Line *subject to these claims*, and agreed to accept in full satisfaction and discharge of its mortgages, *the amount for which the property would sell at public sale subject to these claims.*

5. The final decree was rendered nearly four years ago, the trustee made no objection to it, took no appeal from it. Under this final decree the trustee procured the property to be sold *subject to these claims.* The record shows that the sale was so advertised, and the masters' report of sale shows that it was so sold. After the sale was confirmed by the court The Farmers' Loan and Trust Company received from

the proceeds of sale its compensation for services and expenses in the suit. Its counsel and solicitor's fees were paid in full, and the remainder of the proceeds of sale were distributed according to the terms and provisions of the decree. On April 12, 1879, the purchasers received their deed, subject only to these claims, took possession of the property, reorganized the railway company, and have been in full possession ever since.

What possible interest can this trustee have in any controversy between the purchasers and these claimants, or any or either of them? The foreclosure decree merged the mortgages and bonds represented by the trustee. The sale under the decree, and payment and distribution of the purchase money bid at the sale forever satisfied and discharged the decree as to all the rights and interests of the trustee.

There is no decree here against the Farmers' Loan and Trust Company.

It matters not to this trustee whether these several claims are paid or defeated. If they are paid the Farmers' Loan and Trust Company, as trustee, will lose no dollar. If they were all defeated, it would not thereby gain a dollar. Its mission and interest in this suit ceased finally when it received and distributed the proceeds of sale. If these purchasers were to defeat one of these claims, they would save that much, and thereby get the property that much cheaper; but an outside bond-holder not in the re-organization scheme, would not get a cent more on his bond than he has already received under the distribution of the proceeds of sale made in accordance with the terms of the decree. Only parties to a decree can appeal from that decree.

Ex parte Cutting, 4 Otto 22.
Payne v. *Niles*, 20 Howard 219.
Bayard v. *Lombard*, 9 Howard 530.

Under the facts disclosed by the record and the law as decided by this court, the Farmers' Loan and Trust Com-

pany has no right to an appeal from any of the several decrees rendered against the purchasers. Its name should be stricken from the docket as appellant. We ask the court to so hold.

The words of the modification of the decree—the *new* 13th clause, rendered May 8, 1878—"without prejudice to the right of the Farmers' Loan and Trust Company, to object to the same, and to appeal from any order or orders which may be hereafter made by the court in relation thereto," mean nothing, and surely preserve no right of appeal when viewed in the light of the *subsequent action* of this trustee.

The Farmers' Loan and Trust Company "prejudiced" and forever precluded and foreclosed its right to appeal from any decrees or orders directing the payment of these several claims, *when it voluntarily sold the property subject to the several amounts that might thereafter be adjudged due on these several claims, and accepted and distributed the proceeds of that sale in satisfaction of its mortgages.*

IV.

BECAUSE SAID APPEALS WERE PRAYED AND GRANTED BY THE COURT BELOW, IN BEHALF OF AUSTIN CORBIN, GILES E. TAINTOR, AND JOSIAH B. BLOSSOM, AS APPELLANTS, AND BECAUSE SAID CORBIN, TAINTOR AND BLOSSOM WERE NOT PARTIES TO THE SUIT IN THE COURT BELOW AND HAVE NEVER BECOME SUCH PARTIES TO THE RECORD, BY PETITION OR OTHERWISE, AS TO ENTITLE THEM TO PROSECUTE THESE APPEALS.

Upon the ground upon which appellants have based their appeal, this statement is correct as to the several appeals embraced in this motion. If these purchasers had appealed separately from each of the fourteen several decrees decreeing sums exceeding $5,000—which fourteen

decrees are not included in this motion—and if they had based their appeals on the ground that the *amount* in each case was excessive, they probably would have had the right to prosecute such several appeals from decrees coming within the jurisdiction of this court as to amount in controversy. But they have presented no such appeals.

These three appellants are not original parties to the suit, that fact will not be disputed. They never became parties to the suit by petition to intervene, or order of court. They have never acted or been treated as parties to the suit.

In *ex parte Cutting*, 4 Otto, 21, Mr. Chief Justice Waite, after a full review of authorities, says: "From this it is apparent that if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted; and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party." It is clear that these purchasers can not claim the right to appeal on the ground of their being parties to the suit.

They are entire strangers to the record from the institution of the proceedings down to the moment they became the purchasers of the property at the foreclosure sale.

Their only connection with this record is as purchasers of the property. If prior to their purchase they owned, or held under a trust agreement *certain of the bonds* secured by the mortgages, that fact did not make them parties, nor does it in any way tend to give them the right of appeal to this court. The trustee named in the mortgages—the Farmers' Loan and Trust Company—represented them and all other bondholders, and bound them and all other bondholders, by its action and conduct of the litigation. The final decree of foreclosure merged the mortgages and bonds, and the instant these appellants paid

their bid and became thereby purchasers, the mortgages and bonds ceased to exist as such, and the decree was satisfied and discharged so far as the rights and interests of the mortgagees and bondholders were concerned. It follows, therefore:

1. That Corbin, Taintor and Blossom stand before this court solely AS PURCHASERS; whatever rights they possess regarding this litigation, are rights that have accrued to them *by reason of their having become purchasers of the property in litigation.*

2. THEY ARE BOUND BY ALL ORDERS AND DECREES RENDERED BY THE COURT IN THE CAUSE PRIOR TO THEIR PURCHASE, AND CAN NOT QUESTION THEM, OR APPEAL FROM THEM.

3. Their right to claim relief at the hands of the court by appeal *is limited strictly to proceedings subsequent to their purchase*, and must pertain to some matter or right arising and growing out of such *subsequent proceedings*, entirely distinct from the matters and rights adjudicated and decreed by the court *prior* to their purchase.

These propositions are fully supported by the decisions of this court.

In *Blossom* v. *The Milwaukee and Chicago Railroad Company*, 1 Wallace 655, Mr. Justice Miller, in delivering the opinion of the court, uses the following language:

"It is certainly true that he cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation, may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard

to the subject matter of the litigation, which the court is bound to protect. * * * A purchaser or bidder at a master's sale in chancery subjects himself *quo ad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to.

In *Delaplane* v. *Lawrence* (10 Paige, 602), Chancellor Walworth says, that "in sales made by masters under decrees and orders of this court, the purchasers who have bid off the property, and paid their deposits in good faith, are considered as having inchoate rights, which entitle them to a hearing upon the question whether the sales shall be set aside. And if the court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal."

In *Hinkley* v. *Gilman, etc., R. R. Co.*, 4 Otto, 469, Mr. Chief Justice Waite, after quoting from and approving *Blossom* v. *Railroad Company*, says: "The receiver can not and does not attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. To that extent he has been subjected to the jurisdiction of the court, and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and after the final decree below has the right to his appeal here. In this case, the final decree has been given, and the case is properly here upon the appeal as prayed and allowed. This will not keep anything in litigation but the receiver's accounts. The title to the property and the possession under the sale cannot be in any manner affected. Everything can be closed up in the court below, in accord-

In *Fosdick* v. *Schall*, 9 Otto 235, Mr. Chief Justice Waite says: "We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgage property, as may, under the circumstances of the particular case, appear to be reasonable. * * * The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applied in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order that while favoring one, injustice is not done to another. If this can not be accomplished, the application should ordinarily be denied."

The final decree of foreclosure under which these purchasers bought the property, *binds them*. All rights, all questions of law, and all questions of fact adjudicated by that final decree, are forever fixed and determined, so far as these purchasers are concerned. *Blossom* v. *Railroad Company*, and *Hinckley* v. *Gilman, etc., R. R. Co., supra*, settle all controversy on this point. What, then, does the final decree *adjudicate* as to the claims of these several intervening petitioners?

1. *It recognized the existence of these claims.* As has been already shown throughout the entire proceedings, from the first order to the final decree, and by various orders en-

tered in the progress of the cause, the fact of the existence of these claims has been recognized, and provision for their payment has been continuously preserved and guarded. The final decree fully recognizes them *as existing*.

2. The final decree *adjudicates* the *rights* and *priorities* of these several claims. It determines their equitable *status*.

First. In the original decree, *before modification*, these claims were "now here found, and adjudged, and decreed to be prior and superior to the liens of the said mortgages." [Record p. 221.]

This decree further provided "that on delivery of the deed so much more of the purchase money shall be paid into court in cash, * * as shall be necessary to pay and discharge * * * that portion of all such *claims* and *sums* of money as shall be hereinafter allowed by this court and by the circuit court of the United States, for the District of Indiana in the cause pending therein hereinafter referred to, in preference to the liens of the hereinbefore mentioned mortgages or deeds of trust, for *debts* due by said railway company for work, labor, supplies and material done and furnished during the six months next preceeding the first day of December, 1874, in the operation of said Main Line, of said railroad, which payment for *debts due* as last aforesaid for six months prior to the first of December, 1874, shall be made into court without prejudice to the right of the Farmers' Loan and Trust Company to object to the same and to appeal from any order or orders which may be hereafter made by the court, directing the moneys so paid to be distributed to the *various claimants* thereof." [Record, p. 220.]

It is clear from these quotations that the original decree of July 24, 1877, recognized the existence of these claims, decreed them to be prior and superior to the liens of the mortgages, and provided for their payment out of the

proceeds of sale before any distribution to bondholders. It also recognized them as *several*, and not joint.

Second. The modification of the final decree, entered May 8, 1878, *adjudicated absolutely the priority of these claims over the mortgages.* It provides that the property shall be sold SUBJECT TO such "claims and sums of money as are now under consideration by, and as shall be hereafter allowed by this court, * * for debts due by said railroad company, for work and labor done and supplies and material furnished during a period not exceeding the six months next preceding the first day of December, 1874, in the operation of that portion of the said railroad hereby directed to be sold, * * and such back pay, labor and supply claims, * * shall be assumed by the purchaser or purchasers, in addition to the amount of the purchase-money so bid." [Record, p. 304.]

By the final decree as it now stands, these claims are *not* to be paid out of *proceeds of sale* accruing from The Farmers' Loan and Trust Company's foreclosure decree and sale. Hence, the trustee in the mortgages has no interest whatever in the defeat or payment of these claims, and has no right to appeal from any orders relating thereto made after its sale of the property under this decree. These purchasers bought the property under this decree, finally adjudicating the rights and priorities of these several claimants. They are bound by these provisions of the decree, and can not question the *status* given to these claims by the decree. It should be remembered that *before* The Farmers' Loan and Trust Company procured this modification of the final decree, the special masters, Howland and Howland, had filed their reports allowing these claims, and the trustee had filed exceptions to the reports, in which exceptions the counsel for trustee, say "and these exceptions are hereby made and intended to be made to *the separate and several claims* named and set forth," [record, p. 280,] showing that they

regarded them as *several* and not joint. It is clear, then, that the final decree under which the property was sold, (1.) Recognized the existence of these claims as separate, several and independent claims. (2.) That it finally adjudicated the rights and priorities of these several intervening petitioners. (3.) The only question left undetermined by the final decree is the question of *the amounts due on these several claims.*

The decree itself provides as follows: "No question being reserved except the question as to the amount of the *claims* or *sums* of money to be allowed as provided in the fourteenth clause of this decree, and so far as the same shall be passed upon by the court, such allowance or disallowance shall take effect as if now incorporated in and passed upon by this decree." [Record, p. 223.]

The word "fourteenth" in this quotation should now be read "thirteenth," because by the modification of May 8, 1878, the *new* thirteenth clause takes the place of the old thirteenth and fourteenth clauses.

If words mean anything this provision of the final decree surely means that the final decree settled all rights, and determined all questions excepting one, and that one question is: *How much is due to each of these several intervening petitioners?*

This single question these purchasers have the right to contest as against *each* of these claimants. But the claims being *separate, several* and *independent* of each other, they can only appeal to this court from decrees involving more than five thousand dollars exclusive of costs. This decree left *no question* whatever open and undetermined as between the Farmers' Loan and Trust Company and these several interveners. The instant the sale was made it mattered not to this trustee what amount was allowed by the court on each of these claims. It received at its sale under its decree *all that it can ever claim.*

That this decree was a *final* decree is settled beyond dispute by the decisions of this court.

Whiting v. *Bank of U. S.*, 13 Peters 15.
Forgay v. *Conrad*, 6 Howard 204.
Bronson v. *Railroad Company*, 2 Black. 529.
Thompson v. *Dean*, 7 Wallace 342.
Stovall v. *Banks*, 10 Wallace 583.

This is a decree the Farmers' Loan and Trust Company had the right to *consent to*, and agree to be bound by, regardless of the question whether these claims were or were not in strict law prior and superior *liens* upon the property, and the *consent* of the trustee, embodied in the decree procured and entered on its own motion, that they *are* to be treated and regarded as liens prior and superior to the mortgages, *makes that the law of this case as to the trustee and as to the purchasers under that decree.* That the court would, under the orders entered at the commencement of these proceedings, and during their progress, and under the facts disclosed by this record, have had a perfect right to enforce payment of these claims—not only those accrued within *six months*, but *all* labor and supply claims accrued prior to the receivership—out of the proceeds of sale is perfectly clear. The *conditions* imposed by the court upon granting and extending the receivership, and subsequent orders made by consent of the trustee and all parties to the suit, gave the court that right. And the vast expenditures of the receiver in extraordinary repairs, improvements, new equipment, new construction and payment for right of way, gave the court that right. That part of the decision of this court in *Fosdick* v. *Schall* bearing upon the point of the power of the court to impose *conditions* at the time of granting a receivership has been quoted in another connection. In the same decision, in discussing the power of the court to use the proceeds of sale in the payment of such claims as these, where no such

conditions were imposed in the order granting the receivership, Mr. Chief Justice Waite says: "Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgage property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership."

It would be very difficult to find language more aptly descriptive of this cause than these sentences are. They are quoted here to show that, in view of the whole case, as then well known and of record, the Farmers' Loan and Trust Company had the right to ask the court in its decree to give these claims priority over its mortgages. It did so ask, the court did so decree, the trustee consented to that decree, and that consent is the end of the law to these purchasers under that decree. In the final decree, as modified, the trustee did *not* ask to have these claims paid out of *proceeds of sale*. It wanted to realize on its mortgages, and get quit of the litigation without waiting for the court to ascertain and adjudicate the exact sum due to each of these claimants. Consequently, it asked for and obtained a decree selling the property *subject to these claims*, and obliging the

purchasers to assume the payment of them when adjudicated. The trustee was well advised of all orders under which the receiver acted, and of his expenditures. It knew that the original order of appointment gave the receiver "authority, subject to the supervision of this court, to make such repairs and additions to said railroad property as may be essential to the safety of the same, and proper in his judgment for carrying on its said business." [Record, p. 72.]

It knew of and consented to the orders of April, July, September and December, 1875, under which several hundreds of thousands of dollars were expended by the receiver in improvements, extraordinary repairs, new equipment, and for right of way. [Record, pp. 91, 92, 93, 94.] It knew of all of the receiver's reports to court, minutely detailing his work in the improvement and administration of the property. These reports were each referred to master for examination and report, and were all, upon examination, confirmed by the court. [Record, p.]

his final decree was executed and closed, so far as The ners' Loan and Trust Company is concerned, in April The sale was made subject to these claims as asked e trustee in its decree, and the *trustee has received and buted the proceeds of sale.* [Record, p. 335.] These asers, in accordance with the terms of the decree, took l conveying the property subject to these claims as prior and superior to the title conveyed to them by eed. [Record, p. 336.] They cannot question the and priorities established and adjudicated by the final e. The claims of these several claimants are recog- by the decree, they are decreed to be prior and supe- the lien of the mortgages and the title acquired by purchasers at the sale under the decree, they are recog-

conditions were imposed in the order granting the receivership, Mr. Chief Justice Waite says: "Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgage property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership."

It would be very difficult to find language more aptly descriptive of this cause than these sentences are. They are quoted here to show that, in view of the whole case, as then well known and of record, the Farmers' Loan and Trust Company had the right to ask the court in its decree to give these claims priority over its mortgages. It did so ask, the court did so decree, the trustee consented to that decree, and that consent is the end of the law to these purchasers under that decree. In the final decree, as modified, the trustee did *not* ask to have these claims paid out of *proceeds of sale*. It wanted to realize on its mortgages, and get quit of the litigation without waiting for the court to ascertain and adjudicate the exact sum due to each of these claimants. Consequently, it asked for and obtained a decree selling the property *subject to these claims*, and obliging the

purchasers to assume the payment of them when adjudicated. The trustee was well advised of all orders under which the receiver acted, and of his expenditures. It knew that the original order of appointment gave the receiver "authority, subject to the supervision of this court, to make such repairs and additions to said railroad property as may be essential to the safety of the same, and proper in his judgment for carrying on its said business." [Record, p. 72.]

It knew of and consented to the orders of April, July, September and December, 1875, under which several hundreds of thousands of dollars were expended by the receiver in improvements, extraordinary repairs, new equipment, and for right of way. [Record, pp. 91, 92, 93, 94.] It knew of all of the receiver's reports to court, minutely detailing his work in the improvement and administration of the property. These reports were each referred to a master for examination and report, and were all, upon such examination, confirmed by the court. [Record, p. 323.]

This final decree was executed and closed, so far as The Farmers' Loan and Trust Company is concerned, in April 1879. The sale was made subject to these claims as asked by the trustee in its decree, and the *trustee has received and distributed the proceeds of sale.* [Record, p. 335.] These purchasers, in accordance with the terms of the decree, took a deed conveying the property subject to these claims as liens prior and superior to the title conveyed to them by said deed. [Record, p. 336.] They cannot question the rights and priorities established and adjudicated by the final decree. The claims of these several claimants are recognized by the decree, they are decreed to be prior and superior to the lien of the mortgages and the title acquired by these purchasers at the sale under the decree, they are recog-

nized and treated all through the record and in the final decree as separate, several and independent claims. The only question left open for controversy between the purchasers and claimants is the several amount due from the purchasers to each several claimant for *his* service performed or supply furnished upon *his* separate and several contract and transaction. No one of the several claimants embraced in this motion has a decree for the sum or value of $5,000. Hence, it is true that these appellants, Corbin, Taintor and Blossom, are not by law entitled to prosecute appeals from said several decrees, and the motion to dismiss the appeals and vacate the supersedeas, *as to the several intervenors named therein*, should be sustained.

V.

BECAUSE THE DECREE OF OCTOBER 31, 1881, UPON WHICH APPELLANTS CLAIM TO BASE THEIR PRESENT ACTION, IS SEVERAL, AND NOT JOINT, AND WAS RENDERED UPON DISTINCT, SEPARATE AND SEVERAL INTERVENING PETITIONS, AND TESTIMONY INTRODUCED, SEVERALLY, THEREUNDER, SAID SEVERAL INTERVENING PETITIONS, AND TESTIMONY, BEING IN NO MANNER CONNECTED WITH, OR DEPENDENT UPON, EACH OTHER. THEREFORE, A JOINT APPEAL DOES NOT LIE FROM SAID SEVERAL DECREES, AND NO APPEAL CAN BE PROSECUTED FROM ANY OR EITHER OF SAID SEVERAL DECREES DECREEING PAYMENT OF A SUM LESS THAN FIVE THOUSAND DOLLARS EXCLUSIVE OF COSTS.

The order of reference of June 4, 1877, to Howland and Howland, directing them to ascertain "the just and true amount due upon *each claim* or *petition*, * * provided that each claim or petition so presented to the receiver or to the court shall state the exact date the indebtedness accrued, what the indebtedness accrued for, where the indebtedness accrued, and what amount thereof remains unpaid, and the claimant or petitioner shall make affidavit to the correctness of his said claim or petition." [Record, p. 209.] And various other orders touching these claims theretofore entered in the cause, show that the claims are several. The final decree and deed treat and recognize them as several. The stipulation omitting from this record almost every one of the intervening petitions included in

this motion, shows that they are several, and are so recognized by these appellants. [Record, pp. 195, 196.]

The general decree of October 31, 1881, from which these appellants are seeking to prosecute these appeals, [Record, pp. 449 and 454,] and the petitition for supersedeas filed by these appellants, [Record, p. 500,] prove conclusively that these claims are, and have always been treated as, several and independent claims. In the very nature of the case it is obvious that these claims must be several, representing entirely separate and distinct interests. One may be for a supply of some kind furnished in Indiana, in June, 1874; another may be for the use of locomotives or cars, in Illinois, in October, 1874; another may be for the service of a brakeman or conductor in July, 1874; another may be for service in the Urbana shops in August, 1874; another may be for service as a telegraph operator in September, 1874; another may be for service as trackman in November, 1874; each a separate service or supply rendered or furnished under a separate and distinct contract, and representing a separate and distinct transaction. The trackman has no interest in the conductor's claim. The supply and material man has no interest in the telegraph operator's claim. Each several claimant's interest is limited to his proved claim. It matters nothing to him what happens to other claimants. If their claims are utterly defeated, that does not defeat *his claim* or affect *his interest*.

Decisions have already been cited firmly establishing the proposition, that *neither party* can appeal where separate and distinct interests are in dispute, each involving an amount less than the statute requires, and where the parties are joined in the litigation for convenience and to save expense. There is no conflict of authority upon this point.

Seaver v. *Bigelows*, 5 Wallace 208.
Oliver v. *Alexander*, 6 Peters 143.
Stratton v. *Jarvis*, 8 Peters 4.
Rich v. *Lambert*, 12 Howard 347.

Pavior Co. v Mulford, 10 Otto 148.
Russell v Stansell, No 929 Oct. Term 1881.

It is very certain that a dozen of these claimants, holding claims each less than $500, but in all aggregating over $5,000, could not have joined in an appeal, if they had been defeated, and, by adding their several interests together, sustained the jurisdiction of this court. It is equally certain under the decisions of this court, that the appellants, having a several controversy with each one of these claimants, cannot maintain the jurisdiction of this court by seeking to join separate and distinct interests in the same appeal.

The sixth and seventh clauses of the motion will be considered together. They are

VI.

BECAUSE SAID APPELLANTS ARE SEEKING BY A JOINT APPEAL AND SUPERSEDEAS, TO APPEAL FROM A MERE FINDING OF THE COURT BELOW, FROM WHICH NO APPEAL LIES, AND UPON WHICH NO ONE OF SAID SEVERAL DECREES IS WHOLLY BASED, OR NECESSARILY DEPENDENT.

VII.

BECAUSE APPELLANTS ARE IN THIS ACTION, IN LEGAL EFFECT, SEEKING TO PROSECUTE AN APPEAL FROM THE FINAL DECREE OF FORECLOSURE RENDERED JULY 24, A. D. 1877, AND UPON MOTION OF THE FARMERS' LOAN AND TRUST COMPANY, MODIFIED ON MAY 8, A. D. 1878, FROM WHICH FINAL DECREE, AND MODICATION THEREOF, NO APPEAL CAN NOW BE TAKEN. THE SAID FINAL DECREE, AND MODIFICATION THEREOF, FIXED AND DETERMINED THE LEGAL RIGHTS AND PRIORITIES OF ALL PARTIES AND INTERVENING PETITIONERS, EXCEPTING AND RESERVING ONLY THE DETERMINATION OF THE SEVERAL AMOUNTS TO BE ALLOWED TO THE INTERVENING PETITIONERS. THE DECREE OF OCTOBER 31, 1881, WAS RENDERED IN FURTHERANCE OF, AND TO SECURE, THE PERFORMANCE OF THE PROVISIONS OF SAID FINAL DECREE AND THE MODIFICATION THEREOF. IT SIMPLY DETERMINES THE AMOUNT DUE TO EACH OF THE SEVERAL INTERVENING PETITIONERS, WHICH IS THE ONLY QUESTION RESERVED IN SAID FINAL DECREE; HENCE THE ONLY QUESTION RAISED BY APPEAL FROM THE DECREE OF OCTOBER 31, 1881, IS THE QUESTION OF THE AMOUNT DECREED TO EACH OF THE SEVERAL INTERVENING PETITIONERS. THEREFORE NO APPEAL CAN BE PROSECUTED FROM ANY, OR EITHER, OF SAID SEVERAL DECREES DECREEING PAYMENT OF AN AMOUNT NOT EXCEEDING THE SUM OR VALUE OF FIVE THOUSAND DOLLARS, EXCLUSIVE OF COSTS.

The only objection or exception to the rulings, orders and decrees of the court below, found anywhere in the rec-

ord, is the objection and exception of these appellants found in the decree of October 31, 1881. It reads as follows: "And the said, the Farmers' Loan and Trust Company, by Turner, Lee & McClure, its solicitors, and the said Austin Corbin, Giles E. Taintor and Josiah B. Blossom, purchasers, by their solicitors, objecting and excepting to that part and so much of the said decree as finds 'that within the period named in said order of February 18, 1880, the earnings of said Indianapolis, Bloomington and Western Railway that ought to have been applied to the payment of the several claims, hereinafter referred to, were diverted to the payment of interest upon the bonded indebtedness of said railway company, additional equipments purchased for, and lasting and valuable improvements made upon said railway to the amount of $587,000,' for that there is no sufficient, competent or legal evidence of the said facts, and to the orders and decrees for the payment of the said several claims by the said Austin Corbin, Giles E. Tanitor and Josiah B. Blossom as purchasers." [Record, pp. 498, 499.]

It will be observed that appellants here again *admit* that *these claims* are *several*, and that the *decrees* of October 31, 1881, are *several*, hence they cannot claim the right to appeal from these decrees included in this motion, on any other ground than that of their above exception to a *finding* of the court below.

It is evident, then, that this appeal, at least so far as it relates to these decrees less than $5,000, is based upon the assumption that these decrees are based wholly and solely upon that finding, that that finding is itself a *decree* decreeing the payment of a fixed fund into court for distribution by the court to these several claimants, and that by an attack upon that finding they can reach back and review the adjudication of rights and priorities established and determined by the final decree rendered nearly four years since.

This assumption is erroneous in every particular.

1. These several decrees of October 31, 1881, are *not* based wholly and solely upon the finding of the court excepted to by appellants. On the contrary, not one of these decrees is necessarily dependent upon this finding of the court, and *it alone* would not support a single one of these decrees.

It has already been shown that orders entered by consent and agreement of The Farmers' Loan and Trust Company, and all parties to the cause, long before this finding was made by the court, would amply sustain these decrees without the aid of any such finding regarding diversion of earnings. The *conditions* upon which the receivership was granted originally, and extended to the cross suit of the trustee in the mortgages, and the orders of April 7 and December 7, 1875, enlarging these conditions, would have fully supported these decrees, without regard to this finding. [Record, pp. 73, 90 (at bottom), 91, 93.]

The decision of this court in *Fosdick* v. *Schall*, 9 Otto 251 and 253, settles this point beyond controversy. Again, this finding *alone* would not support or justify any one of these several decrees. Each intervenor had to prove *other facts* far more material and necessary to procure his decree, than this finding can possibly be under the orders contained in this record. The mere fact that the *same question of law, or of fact*, enters as *one* of several different elements into many separate, several and distinct controversies, never can make the separate and several controversies so joint in interest as to authorize an appeal by aggregating the several amounts decreed in the separate and several controversies. A hundred separate and independent suits may each involve, and partially depend upon, the same question of law, or some single fact; yet that does not make them joint in interest, nor does it so unite the distinct controversies as to authorize their joinder in appeal in order to make the amount necessary to give jurisdiction.

If the success of a number of separate, distinct and several claims in litigation were to depend wholly upon the determination of the *same questions of law and fact*, even that would not make such a joint interest as to authorize an appeal by aggregating the several amounts decreed. The cases of *Rich* v. *Lambert*, 12 Howard 347, and *Oliver* v. *Alexander*, 6 Peters 143, most fully establish and support this statement.

2. This finding is not a *decree*, nor is it appealable. It does not decree the payment by these purchasers of any *fixed fund* into court for distribution by the court to these several claimants. It is not even a part of the decree. A finding is a very different thing from a decree. There is no controversy here over a *fixed fund* either in, or to be paid into court. If it were true that this mere finding determines the aggregate fixed fund to be paid by these purchasers, they would have to pay $100,000 more than these several decrees amount to. The finding shows a diversion of $587,000, while the several decrees rendered in favor of interveners on October 31, 1881, amount in the aggregate to less than $487,000. But even if there were a fixed fund to be paid into court by this decree for distribution between these claimants, and if this finding complained of determined the exact amount of such a fund, even that state of facts would not authorize these appellants to join and unite these several and distinct decrees rendered upon several and distinct matters in controversy, in order to give this court jurisdiction. The decision of this court in the case of *Seaver v. Bigelows*, 5 Wallace, 211, settles this point. In the opinion, Mr. Justice Nelson, after citing and approving *Rich v. Lambert*, *Oliver v. Alexander*, and *Spear v. Place*, *supra*, says:

"The only plausable ground upon which the jurisdiction can be sustained in the case before us is, that the several judgment creditors are proceeding against a common fund,

which each is interested to have applied to the payment of his demand. But the same ground for the jurisdiction existed in the case of the seamen, salvors and owners of cargo, for damages. The answer is, that the interest of the judgment creditors in the common fund could not exceed the amount of their several and separate judgments, and if these are under the $2,000, the same reason exists for cutting off the appeal as if the suit had been separate, and not joint."

The court below did not, in the decrees of October 31, 1881, treat these claims as dependent upon this finding, but expressly treated them as claims, "*which the said purchasers are obliged to pay under the decree and various orders of the court, rendered and entered heretofore in this cause.*" These words were not in the draft of the decree prepared by counsel, and presented to the court, but the court caused them to be inserted. No one of these decrees purports to be based on this finding, but they are all based on *all* the different *facts found* coupled with the "decree and various orders of the court, rendered and entered heretofore in this cause." [Record, pp. 450 to 454.]

Suppose the court had made this same finding complained of, and then had only rendered decrees in favor of forty-nine of these interveners, decreeing to each only one hundred dollars.

Could these appellants have appealed from those forty-nine decrees? They most certainly could *not*, for the simple reason that *the finding* would *not* be *the matter in dispute between the appellants and the forty-nine several claimants.*

Neither can they, on account of this finding, appeal from eleven hundred and forty-nine distinct and several decrees each for a sum less than $5,000.

The matter in dispute between these appellants and each of these intervenors *is not this finding*, but it *is* a distinct and several controversy between these purchasers and each

several intervenor. Each several controversy involving an answer to this question, viz: What amount is due to *this claimant* on *his several contract* for labor, supplies or material?

3. The attempt to review and unsettle the rights and priorities adjudicated by the final decree, by attempting to appeal from a mere finding of the court, must fail.

First. Because it is a mere finding upon which no one of these decrees is based or dependent, and is not appealable.

Second. Because these purchasers are bound by the final decree and its adjudication of the *rights* and *priorities* of these several claimants.

Third. Because the only question reserved, and left for future determination, by the final decree is the question as to *the amount* due to *each* of these several claimants, and because said final decree provides that "so far as the same shall be passed upon by the court, such allowance or disallowance *shall take effect as if now incorporated in and passed upon by this decree.*" [Record, p. 223.]

If any meaning and effect is to be given to these last words quoted from the final decree, they make this entire general order or decree of October 31, 1881, a mere foot note to the final decree or order entered in the course of executing the decree, the same to take effect as of the date of the final decree. But whether that is so or not, it is very clear that the finding of the court constituting the only action or ruling complained of, can not be made the basis of an appeal to this court; nor can the controversy here be shifted from the real matters in dispute, and made to rest upon this finding. There is no controversy here between these appellants, on one side, and all these claimants, jointly, on the other side, about anything. There is no fund in court to dispute over. There is no fund or fixed sum of

money in or out of court *to which these claimants* JOINTLY *lay claim.*

There is no fund any where to which these appellants lay claim as against any *joint claim* of these claimants. These claimants have no *joint claim*; they have no interest here *jointly.* Each intervening petitioner is interested in his own distinct and several claim, and in none other. His controversy with these appellants is limited to *his own claim*, and *their* controversy is with each intervening petitioner severally, and is limited to the several decree rendered in favor of each such petitioner. Of the several decrees included in this motion, *five hundred and sixty-one* are each for a sum less than $100; *eight hundred and forty-five*, each for a sum less than $200; *one thousand and seventy-one*, each for a sum less than $500; *eleven hundred and nineteen*, each for a sum less than $1,000, and every one of the 1,149 decrees embraced in the motion is for a sum far less than $5,000. These several sums are, in themselves considered, small, *but to these claimants they are large*; so large that the long delay in their payment has caused much hardship. A thousand or five hundred dollars is a matter of large moment to a man when the loss of it, or long delay in its payment, means the loss of his home. Many of these claimants have suffered, and are now suffering, for the lack of the amounts decreed to them.

To put them now to the expense and long delay of an appeal, amounts almost to a confiscation of their claims. The fourteen decrees, each for a sum exceeding $5,000, are not included in this motion. Some of the points presented above may be applicable to them also, but it is desired by this motion to present only the cases of claimants holding separate and several decrees for sums less than the amount required by law to give jurisdiction to this court on appeal, leaving the fourteen large decrees for other and future action. The number of claimants interested in this motion is so great

as to almost make it a matter of public, rather than mere private, interest. In view of the facts, orders and decrees disclosed by the record, and the law applicable thereto, as determined by repeated decisions of this court, we ask that the appeal, so far as it relates to the claimants named in the motion, may be dismissed; that the *supersedeas* granted may be vacated as to the several decrees of said several claimants, and that the motion may be in all things sustained. Respectfully submitted,

McDONALD & BUTLER,

Solicitors for Intervenors.

By JOHN M. BUTLER.

Indianapolis, Ind., March 29, 1882.

APR 3 1892

SUPREME COURT

OF THE UNITED STATES.

THE FARMERS' LOAN AND TRUST COMPANY, AUSTIN CORBIN, GILES E. TAINTOR and JOSIAH B. BLOSSOM vs. CHRISTIAN WATERMAN, et al.	No. 1,212.

BRIEF

IN SUPPORT OF MOTION TO DISMISS APPEAL.

CLAYPOOL & KETCHAM,
Solicitors for Intervenors.

Snyder, Sexton & Co., Prs., Indianapolis.

SUPREME COURT

OF THE UNITED STATES.

THE FARMERS' LOAN AND TRUST COMPANY, AUSTIN CORBIN, GILES E. TAINTOR AND JOSIAH B. BLOSSOM vs. CHRISTIAN WATERMAN, ET AL.	No. 1,212.

The matter for hearing is a motion by very numerous appellees, severally made to dismiss the appellants' appeal from an order made in a Chancery cause for the payment of their several claims, upon their respective intervening petitions. The ground of the motion is:

1. That this Court has no jurisdiction, because the amount claimed by each, and decreed to be paid to each, is less than $5,000, and the order for payment is several and not joint.

Turner and others, who were partners composing the firm of Turner Bros., filed their bills of complaint, one in the Montgomery Circuit Court in Indiana, and

one in the De Witt Circuit Court in Illinois, against the Indianapolis, Bloomington and Western Railway Company, The Farmer's Loan and Trust Companay, a Trustee, and against other Trustees in several mortgages executed by said Railroad Company upon its railroad and property and franchises. There were two lines of its road, one commonly called the main line, extending from Indianapolis, in the state of Indiana, westward across the state line to Pekin, in the state of Illinois, and the other line called the extension, commencing at the city of Champaign and running thence through several towns and cities westwardly to the city of Decatur, all in Illinois. [1]*

The Montgomery Circuit Court and the De Witt Circuit Court, each made an order, November 18, 1874, in the usual form of such orders, appointing a receiver to take possession of the railroads, property and franchises of said Company, and to operate its roads, and out of moneys that might come into his hands as receiver he was ordered to pay, first, operating expenses, and expenses incident to the administration of his trust, including sums due connecting lines, arising from the interchange of business and taxes; then to pay to operatives and employes and to persons having furnished supplies, all sums due for services rendered and supplies furnished, since the first of July preceding the date of the order, which claims are commonly called "back pay claims," for labor and supplies. [71, 75, 91, 92.] Afterwards the Farmer's Loan and Trust Company filed its answer and cross-bill, asking the foreclosure of the mortgages executed to it, and for the appointment of a receiver, and the receiver first appointed was made the receiver for the said Trust Company. [133, 142.]

*Figures in brackets, thus [1], refer to pages of the printed record.

The cause in the De Witt Circuit Court was transferred to the proper United States Court in Illinois, and the cause in the Montgomery Circuit Court was transferred to the United States Circuit Court in Indiana, and the receiver appointed by the State Courts, was made the receiver of said United States Courts, and the order for the payment of the "back pay claims" finally assumed the form of an order for the payment of all such claims for labor and supplies, rendered and furnished during the six months preceding the first of December, 1874.

Pending the proceedings, numerous intervening petitions were filed, asking the payment of "back pay claims," and June 4, 1877, the Courts made an order, [208, 212] referring these claims to Masters, to be heard and reported upon.

Other defendants to the first bill, beside the Farmer's Loan and Trust Company, filed answers and cross-bills, and the cause being ready for hearing, and coming up and being heard, the Court found the equity of the case to be with the complainant in the cross-bill of the Farmer's Loan and Trust Company, as to the main line of said road, and decreed a foreclosure of the two mortgages of the said Trust Company and directed the sale of the main line, and of the franchises etc., to be sold, to satisfy the mortgages to the Trust Company. [213.] The thirteenth article of said decree, as amended by the order of May, 1878, [304] reads as follows:

"13th. That said sale be made subject to judgments for right of way, and to all legal and valid claims therefor, and also subject to all sums legally due for taxes, which are a lien prior to said mortgages; and also sub-

one in the De Witt Circuit Court in Illinois, against the Indianapolis, Bloomington and Western Railway Company, The Farmer's Loan and Trust Companay, a Trustee, and against other Trustees in several mortgages executed by said Railroad Company upon its railroad and property and franchises. There were two lines of its road, one commonly called the main line, extending from Indianapolis, in the state of Indiana, westward across the state line to Pekin, in the state of Illinois, and the other line called the extension, commencing at the city of Champaign and running thence through several towns and cities westwardly to the city of Decatur, all in Illinois. [1]*

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"13th. That said sale be made subject to judgments for right of way, and to all legal and valid claims therefor, and also subject to all sums legally due for taxes, which are a lien prior to said mortgages; and also sub-

ject to the provisions of certain contracts of lease and purchase heretofore made with Oliver Adams for five hundred box freight cars by said receiver; and also subject to that portion of such other claims and sums of money as are now under consideration by, and as shall be hereafter allowed by this court, or the Circuit Court of the United States for the Southern District of Illinois, in the causes pending therein, and affirmed by the Supreme Court of the United States on appeal, should an appeal be taken, in preference to liens of the hereinbefore mentioned mortgages or deeds of trust for debts due by said railroad company for work and labor done and supplies and material furnished during a period not exceeding the six months next preceding the first day of December, 1874, in the operation of that portion of the said railroad hereby directed to be sold, without prejudice to the right of the Farmer's Loan and Trust Company to object to the same, and to appeal from any order or orders which may be hereafter made by the court in relation thereto; which claims, judgments and taxes and car contracts, and such back pay, labor and supply claims as shall be finally adjudged against the property herein directed to be sold, after an appeal so taken, shall be assumed by the purchaser or purchasers, in addition to the amount of the purchase-money so bid, and in all cases where judgments obtained against the receiver are appealed from to the Supreme Court of the United States, and supersedeas granted, the sale of said property hereby directed to be sold shall be subject to the final determination upon said appeal or appeals.

"And the payment of the amount of any claims so allowed, or any judgment against the receiver so obtained, shall not be required to be made at or prior to the time of the delivery of the deed, but the said sale shall be made subject to, and the purchaser or purchasers of said property shall agree to pay off so much of the said claims or sums of money as shall be finally allowed

in the progress of this cause, on or after such appeal, and the same shall be paid and discharged by said purchaser or purchasers within six months after the entry of an order of this court, upon a mandate of the Supreme Court concerning matters so appealed from being filed in this court, and the said deed shall be delivered without payment of said claims or sums of money, or any part thereof, upon the purchaser so conditionally agreeing to pay so much and no more of such claims and sums of money as may finally be allowed on such appeal, and it shall be competent for the court to enforce hereafter, by proper order or decree herein, or to be added to the foot of this decree, any of the provisions or conditions of this thirteenth article of this decree."

Sale was made by the Masters appointed for that purpose, according to the terms of said decree, October 30, 1878, and Austin Corbin, Giles E. Taintor, Josiah B. Blossom, purchasing committee, became purchasers in trust, for the bondholders. [310.] This sale was confirmed December 23, 1878, [327] and a conveyance was ordered March 31, 1879, and made to said purchasers, as purchasing committee and to their successors and assigns, subject to the payment of said "back pay claims," and subject to other claims mentioned, all according to the terms of the above thirteenth article. The purchasers expressly assumed as and for a charge and lien upon the property conveyed to them, prior and superior to any interest vested in them, all such claims as might be finally adjudged against the property conveyed to them. [332, 336.]

The "back pay claims" referred to the Masters under the order of June 4, 1877, were reported back November 16, 1877, [242, 245] and were pending on the

report May 8, 1878, when the order changing the thirteenth article of the decree was made.

October 31, 1881, the order for the payment of "back pay claims" was made. [449.] The order as to this, was as follows, viz:

"The court does therefore, upon the facts so found, etc., order adjudge and decree, that said Austin Corbin, Giles E. Taintor and Josiah B. Blossom do within sixty days, excluding Sundays, from and after the date of this decree, pay to the said several intervening petitioners and claimants the several amounts set opposite their respective names, that is to say:

To Charles F. Webb,	$270.00
" B. F. Dennison,	174.00"

and continuing in this way giving a list of several hundred names.

From the order for the payment of each of these and other claims, the appellants prayed and were allowed an appeal and permitted to file a supersedeas bond, to all of which, each of the claimants severally excepted.

For convenience in argument we here cite and make extracs from some leading cases on the points involved in motion to dismiss.

Oliver vs. Alexander, 6 Pet. 143,

Was a case of libel by officers and seamen for their wages. The court rendered a separate decree for each libellant for the amount due him, and an order for payment *pro rata* out of funds in the hands of an assignee who held the proceeds of ship and cargo in trust for U.

S. and other creditors, and in his hands the funds were attached. The sum decreed to a single libellant in no case exceeded $900. From the separate decrees the assignee prayed an appeal and gave separate bonds from each appeal and a joint appeal bond for the whole. The appeal was dismissed. Justice Story said: 150. "Neither party can claim an appeal to this court in regard to the claim of any libellant, unless that claim exceeds two thousand dollars. The case is not distinguishable in principle from that of an information of seizure, or a libel on a capture as a prize, where various claims are interposed for different portions of the property by persons claiming the same by distinct and independent titles. In such case though the original libel is against the whole property jointly, yet it is severed by the several claims, and no appeal lies by either party, unless in regard to a claim exceeding the sum of two thousand dollars in value."

Stratton vs. Jarvis, 8 Peters 4,

Was a case of libel in the District Court, for salvage service performed by the libellant in saving certain goods and merchandise on board of the brig Sparke while aground The goods were owned by a number of persons. On appeal in the Circuit Court, one twentieth part for salvage was allowed, and the gross amount of salvage was $2,728. The highest amount charged against any claimant on account of his goods was $960. From this the libellant appealed to this court. His appeal was dismissed. Justice Story said:

10. "In the appeal, the case of each claimant having a separate interest must be treated as a separate ap-

peal, *pro inter esse suo*, from the decree, so far as it regards that interest, and the salvage, chargeable on him, constitutes the whole matter in dispute between him and the libellant. With the fate of the other claims however disposed of, he has and can have nothing to do. It is true that the salvage service was in one sense entire, but it certainly can not be deemed entire for the purpose of founding a right against the claimants jointly, so as to make them all responsible for the whole salvage."

Speer vs. Place, 11 Howard, 522.

In this case a vessel was decreed to pay one-fifth of her value $2,600 as salvage, being $520. Held that the salvage allowed and not the value of the vessel determined the question of jurisdiction, and the appeal of the claimant was dismissed.

Rich vs. Lambert, 12 Howard, 347.

Several libels were filed against a vessel for damages which were by the court consolidated and damage was awarded each libellant. To some less than two thousand dollars. An appeal from the decree was, as to the latter dismissed—Nelson, Judge, saying 353. that the consolidation "is allowed by the practice of the court for its convenience, and the saving of time and expense. It is a practice deserving commendation and encouragement in all cases where it can be adopted without complicating too much the proceedings, and thereby prejudicing the rights of the parties. In cases where the several claims against the ship are founded upon a common injury or loss, the question involved depending upon the same general rules of loss and the

same evidence equally applicable to all of them, it is fit and proper that the proceedings should be joint, either by allowing the parties to unite in the libel, or by an order for consolidation, if separate suits have been instituted. * * * Clearly a libellant could not appeal unless his claim exceeded two thousand dollars, nor can the respondent, upon the same principle, unless the amount decreed against him in the particular case exceeds that sum."

The claims in the case now before this court are not so closely allied as in the case just cited. It can not be said that each claim depends upon the same question of law. This is true only as to one point, that is, as to the question of priority. Nor can it be said that the "same evidence is equally applicable to all of the claims," for this is true only in part—that is as to a part of the evidence taken upon the reference made to Fishback, Master, under the order of February 13, 1880. [Rec. p 361.]

Terry vs. Hatch, 93 U. S., 44.

In the matter of the distribution of the assets of an insolvent bank, a decree was rendered requiring all persons interested in the distribution to make themselves parties, and the cause was referred to a Master to report amounts due to each claimant. Terry's claim was reported at $23,257, and the claim of Hatch at $88,000. The whole amount of the claims was $440,000. The sum for distribution was $30,000. Terry alone appealed, and against Hatch only. Held, that the amount in dispute was Terry's interest in that portion of the $30,000 which was payable to Hatch, and as his portion of this would be less than $2,000, his appeal was dismissed.

Seaver vs. Bigelows, 5 Wallace, 208.

Creditor's bill, by two creditors, each having separate judgments less than $2,000. The property sought to be subjected to the payment of their judgments, was of greater value than $2,000. They appealed to this court from an order dismissing their appeal. The appeal was dismissed. Nelson, Justice, said: "The only plausible ground upon which jurisdiction can be sustained is that the several judgment creditors are proceeding against a common fund which each is interested to have applied to the payment of his demand. But the same ground for the jurisdiction existed in the case of the seamen, salvors and owners of cargo for damages. The answer is that the interest of the judgment creditors in the common fund could not exceed the amount of their several judgments, and if these are less than $2,000 the same reason exists for cutting off the appeal, as if there had been separate and not joint suits."

Paving Company vs. Mulford, 100 U. S., 147.

Bill by the Paving Company against Mulford and Campbell, showing that they were each the holder of separate certificates of the Board of Public Works at Washington, which the Paving Company alleged belonged to it, and for which it wanted an accounting. The bill was dismissed and an appeal was taken to this court, and here the appeal was dismissed for want of jurisdiction, on the ground that the claim against each defendant was separate and less than $5,000. The court cited 5 Wal., 208: 12 How., 347; 6 Pet., 143; 8 id., 41 *supra*, Chief Justice Waite saying: "In such cases the appeal of each separate defendant or complainant must

stand or fall according as his own interest in the controversy exceeds or falls short of our jurisdictional amount."

Shields vs. Thomas, 17 Howard, 3.

The representatives of Goldsberry, deceased, filed a bill against Shields, who had married the widow of the deceased, charging him with converting to his own use a large amount of property to which the representatives were entitled, and they obtained a large decree; the share of the respective complainants were apportioned to them in the decree, and the appellant was directed to pay to each the specific sum to which he was entitled, as his proportion of the property misappropriated by Shields. This decree was in Iowa, and appellees in this case united in a bill to enforce the decree in Kentucky, and prayed that Shields might be directed to pay them respectively the sums decreed in their favor by the decree in Iowa. The whole amount of the decree against Shields in Iowa exceeded $2,000. They obtained decree, as prayed. Shields appealed, and his appeal was sustained. Taney, Chief Justice, said: 4. "The matter in controversy in the Kentucky court was the sum due to the representatives of the deceased collectively. They all claim under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial how it was to be shared among them. He had no controversy with either on that point, and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves and not with him."

Rodd vs. Heartt, 17 Wallace, 354.

Steamer was sold under proceedings *in rem* in admiralty, and left in the registry of the court $4,337.51, which was claimed by Rodd and several other persons, creditors of the owners, who by mortgage on the vessel had agreed to secure all these creditors in a body. On the other hand Heartt and others, mariners and furnishers of supplies, claimed the money. The money was decreed to the latter party, and divided among them, and Rodd and his co-mortgagors on one petition prayed and were allowed an appeal. A motion to dismiss the appeal was overruled—Chief Justice Chase saying: "It is apparent that though no one of the claims allowed exceeded $2,000, yet the claim of the appellant which was disallowed, exceeded that sum.

The "Connemara," 103 U. S., 754.

In this case it was decided that where salvors united in a claim for a single salvage for service jointly rendered by them, the owner of the property is entitled to an appeal where the sum decreed exceeds $5,000, although the court deemed it proper to apportion the recovery among the salvors according to their respective merits. Chief Justice Waite after distinguishing this case from 5 Wal. 208; 12 How. 347; 6 Pet. 143; 8 id. 4 cited *supra*, says: "Here (in this case) however, the matter in controversy was the amount due the salvors collectively, and not the particular sum to which each was entitled when the amount due was distributed to them."

Some of the cases cited above—some from each class of cases appealable and cases not appealable, come

near the line dividing the two classes—and in one or two instances cases of each class seem almost to lap over and trench one upon the other—nevertheless, no case of either class acknowledges a conflict with any other, and we believe all and each of one class are distinguishable from all and each of the other class upon principle, and the question for decision, is, to which class does the case now in hand, upon principle, belong?

Oliver vs. Alexander, 6 Pet., 143, and Stratton vs. Jarvis, 8 id., 4, both *supra*, lead the class of cases appealable, and Seaver vs. Bigelows 5 Wall., 208; Rich vs. Lambert, 12 How., 347; Terry vs. Hatch, 93 U. S., 44, and Paving Company vs. Mulford, 100 U. S., 147, all *supra*, follow. and approve the first two cases. In the class appealable, Shields vs. Thomas, 17 Howard, 3, *supra* leads, and Rodd vs. Heartt 17 Wall., 354, and "Connemara" 103 U. S., 754, both *supra*, follow. In this last case Chief Justice Waite distinguishes the two classes of cases.

The principle seems to be this: that where on either side of a case there is a want of perfect unity of interest, in an amount equal to to the jurisdictional amount of this court, no appeal can be maintained by either party. In case of Oliver vs. Alexander, the seamen each had separate and distinct claims, each less than $2,000, against a unit on the other side, that is, against respondents who had a common and single interest exceeding the jurisdictional amount of this court. In Stratton vs. Jarvis, the libellant had a single interest for salvage, more than $2,000 against several interests; that is, a claim for pay out of goods of which several persons were each owners of separate and distinct parts, each part less than

$2,000. Interests which are several cannot be united to make up the jurisdictional amount.

By perfect unity of interest in the aggregate, necessary to make up the jurisdictional amount, we submit that the interest of each and every person going in to make up the amount must be so united that the interest of all *must* go together in the litigation. This was true in Shields vs. Thomas and in the case of Rodd vs. Heartt. In the first of these cases the interest of the representatives of Goldsberry in the property converted was joint, and their demand against Shields was in the nature of a demand in an action of trover by joint owners for the conversion thereof—neither one of several owners could sue, because he could not maintain, by proof, the averment of ownership. Addison on Torts, sec. 525. In the other case, the common mortgage made the several interests of Rodd and the other mortgagees joint. In the controversy they had to move together, as in case of foreclosure. It is well settled that if a mortgage belongs to several persons all must join in the foreclosure, or if a bill is brought by less than all of the mortgagees the reason for this must be shown, as by showing that the other mortgagees refused to join.

In the other cases cited, where appeals were not allowed, and in which the parties having separate interests were on the complainant side of the record, the interest of each was so separate and distinct that each might have moved in litigation alone, without joining any one, or showing any excuse for not joining others. In Rich vs. Lambert, the parties did file separate libels and were consolidated by order of the court for conven-

ience. In the case now before the court, the intervenors each came into court on separate petitions, and any one of the sixteen hundred and more, might have continued to prosecute his petition if every other petitioner had dismissed his petition.

It is not enough that the several claims, which are sought to be united to make up the jurisdictional amount, have some points in common depending upon the same legal propositions, and supported by the same evidence, for, as we have seen, this is true of nearly all, if not of all of the cases cited above, where an appeal was not allowed.

If the court departs from the rule of requiring each and every interest which goes in to make the jurisdictional amount to stand upon the same plane, great injustice and hardship may be wrought in many cases. For illustration: in the present case it might be that the controversy in this court, will be between the appellants, and one or more intervenors whose claims exceed $5,000; about the proof of their respective claims, or about other questions, in which the great majority of intervenors have no interest, and by which they can not be affected, yet they are dragged here to await the decision of such controversies. We do not say that this will be true. It is possible, and this is enough for the argument.

Where the claim of an intervenor as allowed is $5,000 the court would have jurisdiction to inquire into it—whether it was a legal and valid claim against the railroad company, and whether proved and unpaid and the like. Would, or could this court go into inquiries in relation to the claim of Charles Webb for $270? If this

court would, then Charles Webb is compelled to have his small claim examined here. If this court would not do this, then Webb and hundreds like him are here, as it may be, to await the decision of points between other parties in which they have no interest whatever. Story, Justice, in Oliver vs. Alexander, says in relation to seamen on the question now under consideration: "*The defense which is good against one seaman may be wholly inapplicable to another.*" Is not this language true in its application to the intervenors in this case, and should not the same conclusion follows as to the right of appeal?

2. The Farmers' Loan and Trust Company has no interest in the matter appealed from.

The order for the payment of back claims for labor and supplies first made was in its terms enlarged and approv- after the Farmers' Loan and Trust Co. became a party to the proceedings [Rec. pp. 90, 91, 93], and at no time was any objection made to it until in 1876, when said Trust Company moved to vacate the orders on that subject, but this motion was never pressed and never decided. While the "back pay claims" were pending upon reference to Masters the order for sale was made. This order provided for the payment of these claims out of the proceeds of the sale [see Rec. p. 213, paragraphs 14 to 19], and the reference of the claims before made was approved, and continued for the purpose of having it ascertained how much of such claims had to be paid. The amount of the claims could not be known to the court "until the coming in of the report of the Masters;" therefore, the question of the amounts of the claims was reserved, and "no other question,"

because everything else was regarded as settled and it was added that so far as claims were allowed or disallowed they should take effect as if incorporated in the decree at its date [20th article]. After the report of the Masters came in, the order of May 8, 1878, was made, modifying the decree for sale, as stated on a preceding page. Under this decree, as modified, the property was to sell subject to the payment of said "back pay claims."

The Farmers' Loan and Trust Company as trustee of the mortgagees, was required to take on their mortgages whatever the property might sell for, subject to those claims. This the Trust Company has received, and that is the end of its interest. It might have appealed from the order of sale requiring the property to sell subject to these claims, but it did not, and now it is too late. The Farmers' Loan and Trust Company went out of the case after the sale, and after it received the purchase money, whatever may be the result of this appeal, it can never get anything more or less. Having ceased to be a party in interest, it can not appeal.

Ex parte Cutting, 101 U. S., 22.
Payne vs. Niles, 20 Howard, 219.

The decree of foreclosure as modified by the order of May 8, 1878, was a final decree. About this we think there can be no controversy. It is not appealed from, and cannot be now, and is therefore conclusive as to the matters therein adjudged. The purchasers have no right to call the decree in question. They are bound by its terms.

Blossom vs. Mil. & Chi. R. R. 1 Wall., 655.

3. Farther, as to the right of purchasers in this appeal. Waving every other objection to their right to appeal, it seems that these considerations are unquestionbly against them—that is, as to the only matters which they can make any show of a right to controvert, the controversy must necessarily be between them and each individual intervenor, separately. They purchased the property according to the thirteenth article of the decree as made by the order of May 8, 1878, subject to the payment of all such claims as might "finally be adjudged against the property," and by the twentieth clause of the original decree, which as to this, was never changed, "the question as to the amount of claims or sums of money to be allowed," was reserved, and "no other question." Everything else was fixed by orders made before their purchase. In the matter of such enquiries there could be no common interest among the intervenors. And, therefore, upon the authorities preceding, the appeal ought not to be sustained.

There is nothing in the reference to W. P. Fishback, Master, of February, 1880, [Rec. p. 361] to unite these claims. Many of the questions submitted for examination in that reference have no possible bearing on most of the claims, and as we have seen, the having of some points in common in relation to the law and evidence, does not unite the claims so as to give the right of appeal. Besides, the final order for the payment, does not necessarily rest on the report made by the Master upon that reference. It does not profess to rest upon that report. If the whole reference and report were wiped from the record, the order for payment could be maintained upon previous orders and reports,

such as the order for payment made in the order appointing a receiver, and the order for the sale of the mortgaged property—first in the original decree requiring these claims to be paid out of the proceeds of the sale, and secondly, the amendment of the order requiring the property to be sold subject to these claims.

We respectfully submit that the motion to dismiss ought to be sustained.

CLAYPOOL & KETCHAM,
Solicitors for Intervenors.

SUPREME COURT U.S.
FILED
APR 22 1882
JAMES H. McKENNEY

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1881.

THE FARMERS' LOAN AND TRUST COMPANY AND OTHERS, *Appellants*,

vs.

CHRISTIAN WATERMAN AND OTHERS, *Appellees*.

No. 1212.

Appeal from the Circuit Court of the United States from the District of Indiana.

Argument in opposition to the motion to dismiss, on behalf of Austin Corbin and others, purchasers.

JAMES D. CAMPBELL, *of Counsel.*

I.

One of the briefs filed in support of the motion contains what purports to be a "*statement*," which, instead of being confined to matters appearing by the record, material to be considered by the court in connection with the motion, states

many things outside of the record, many others which are wholly immaterial to the consideration of the matter now in hand, and much that can only be properly considered by the court at a hearing upon the merits.

But what is more seriously objected to is, that the inferences of the counsel in his construction of the record, of the pleadings and of the different orders and decrees of the court are so interwoven with his facts as not to be distinguishable from them. In some instances he has permitted himself to go so far as to assert as the settled and indisputable fact of the case matters which are of the very essence and substance of the controversy here.

In the limited time at the disposal of the writer, it is utterly impossible to follow counsel, or to correct by this voluminous record, these manifold inaccuracies.

Without being held to admit the correctness of the statement in regard to matters not expressly controverted, we beg leave to refer the court to so much of the record as seems to us to be material to the consideration of the motion to dismiss.

November 18, 1874.--Turner Bros., representing themselves to be bondholders and creditors of the Indianapolis, Bloomington and Western Railway Company, suing on behalf of themselves, and all other bondholders and creditors of that company, filed their bill in Circuit Court of Montgomery County, Indiana (Record 1), making defendants, the railway company, also the Farmers' Loan and Trust Company, William Dennison, Benjamin E. Smith, Robert Turner and Joseph T. Turner, the latter appearing by the averments of the bill to be the trustees of several outstanding mortgages or deeds of trust.

On the same day, without the service of process, or other notice to any of the trustees, the complainants, by their solicitor, and the railroad company by the same solicitors, who now represent these claimants (Record 71) appeared and procured an order for the appointment of a Receiver.

For the purposes of the present discussion, the following is the material portion of the order:

"In the execution of his trust the Receiver shall have authority to employ all necessary and proper agents, attorneys, officers and laborers, and to fix and alter the compensation of said agents, attornevs, officers and laborers.

He shall have authority, subject to the supervision of the court, *to make such repairs and additions to said railroad and property* as may be essential to the safety of the same, and proper in his judgment for carrying on its said business * * * and of the money that may come into his hands as such Receiver for the operation of the said road, he shall pay, first, *all current expenses incident to the administration of this trust*, and by the operation of said railroad, including all sums due connecting or intersecting lines of railroad arising from the interchange of business heretofore done with any and all such connecting or intersecting lines. And all amounts now legally due from defendant railway company for taxes, county, State or special; *next*, all amounts due to operatives and employees, and all agents of said railroad for any services rendered the said road since the first day of July, 1874. *Next*, all amounts due for supplies purchased and used in operating said road, and furnished since the said first day of July last, and all money not needed for the purposes aforesaid shall, as fast as received, be applied to the other indebtedness of said railway company, but subject to the supervision and further order of the court" (Record 72-3).

November 21, 1874, the same bill was filed, and order entered in the Circuit Court of De Witt County, Illinois (Record, 75).

Having secured the appointment of the Receiver, the original complainants, Turner Brothers, took no further steps in the cause, and except in procuring a single order, wholly disappeared from the litigation, and thereafter, both their solicitor and those who had appeared for the company only appeared in other interests; therefore no special reference to the averments of their bill seems to be necessary.

February 2, 1875, the Farmers' Loan and Trust Company entered its voluntary appearance, answered the complainant's bill, and filed its cross-bill for the foreclosure of its two mortgages on the main line of the defendants' road (Record, 76).

At this point it is deemed best to controvert the statement

so often reiterated in the briefs in support of the motion, to the effect that though the order for the payment of the indebtedness of the company for labor and supplies was made before the trustees had appeared to the suit of became a party to the record, and without its consent, yet "*it was afterwards consented to by the trustees of the several mortgages.*"

So far from being supported by the record is this statement, that there does not anywhere appear the slightest evidence of such consent; on the contrary, it is in direct conflict with the entire course of conduct of the trustees from the beginning of the litigation to its end, and is moreover plainly contradicted by the record.

Counsel undertake to support the statement by reference to the order of the court extending the Receivership to the cross-bill of the Farmers' Loan and Trust Company, to which this clause is appended. "*But this order is not to modify the terms of the order already made in the application and paying out of money*" (Record, 90), and the order is stated to have been entered on the motion of the trustees and with its consent.

The application that was in fact made by the trustee appears in the prayer of its cross-bill in the following words: "that pending this suit a Receiver be appointed, or the present receiver be continued, of said railroad and other property mortgaged to this defendant, *with directions to apply the net earnings and profits thereof to or toward the payment of the interest in arrear and accruing or to accrue upon the said bonds*" (Record, p. 89).

The Illinois court entered the order extending the Receivership, but refused to give the direction asked for as to the disposition of the earnings, and of its own motion, appended the clause referring to its former *ex parte* order respecting the "payment of money" (Record, 90). It will be noted that no such modification appears in the order of the Indiana court (Record, 90).

Counsel also refer to the order of April 7, 1875, as having been made with the "*consent of the trustees.*" This order,

(Record, 91), provides: "The provisions of a previous order of the court restricting the Receiver to the payment of wages due operatives and employés for services rendered the road and amounts due for supplies needed (*used?*) in operating the road since July 1, 1874, are so modified as to place both classes of claims for services rendered and supplies furnished prior to July 1, 1874," on the same basis with claims subsequent to July 1, 1874.

We emphatically deny that this order was entered with the *consent of the trustees.* The Record (p. 91) shows it was entered on the motion of the complainants, Turner Brothers, and is the last appearance of the complainants in the suit.

The record also shows (p. 92) an order "that all earnings and receipts of the road over and above current operating expenses, shall first be appropriated to the payment of the indebtedness incurred by the Receiver, including the Receiver's certificates heretofore issued and negotiated."

Inasmuch as there never were funds sufficient to pay the "indebtedness incurred by the Receiver," nor the certificates "heretofore issued and negotiated," which were still outstanding at the time the purchasers took the property, the original order appropriating net earnings to the payment of old claims for labor and supplies became inoperative.

Nevertheless, as soon as the trustee succeeded in lodging the case in the Federal Court, it filed its motion (Record p. 156) to vacate all orders for the payment of these claims.

In the further progress of the case it continued, at every step to protest against their payment. The decree of July 24, 1877 (Record, p. 220), preserves it right to "object to the allowance of these claims, and to appeal from any order or orders which may be hereafter made by the court directing the money so paid to be distributed to the various claimants thereof."

They excepted to the reports of the Masters (Record, p. 276).

The modification of the decree by which the sale was to be made subject to the claims, preserved its rights as follows: (Record, p. 304)—"Without prejudice to the right of the Farmers' Loan and Trust Company to object to the same, and to appeal from any order or orders which may be hereafter made by the court in relation thereto."

Finally they objected to and appealed from the order directing the payment of the claims (Record, p. 498).

So that from the day of its appearance in the suit to that of the final order, the Farmers' Loan and Trust Company, instead of consenting to any of the orders referred to, has persistently and on all proper occasions, reiterated its objection.

April , 1876.—The Farmers' Loan and Trust Company (Record, p. 109), filed the amended and substituted bill upon which the case thereafter proceeded, which prayed, among other things,

"To have the mortgaged property, whereupon this (the cross-complainants' mortgages) is the first lien sold separately, for the satisfaction of their mortgage debts alone, and not of the debt or debts due to others, and in such manner that the *bondholders* having such first mortgage liens thereon, in case other bidders shall not offer a price sufficient to pay in full their mortgage debts, may, at their own option, bid in or purchase such property whereon they have the first lien, in order to save loss of their said mortgage debts * * * * And f on said sale there should not be enough to pay said bonds and all costs of this proceeding, *that the Receiver be ordered to pay over to your orator all funds in his hands*, in trust for the payment of the said bonds * * * as your orator is now, by the terms and conditions of said mortgage, and by reason of the default aforesaid in payment of the sinking fund, *entitled to all the tolls, incomes, receipts and profits of said railroad*, and is entitled, as it is advised, *to all funds in the hands of the Receiver*, over and above the running expenses of operating said road." (Record, p. 126).

April 26, 1876.—The Farmers' Loan and Trust Company filed its petition for the removal of the cause to the Circuit Court of the United States. (Record, 153).

May 16, 1876.—The record having been filed in the United States Circuit Court, certain of the defendants filed their motion to remand (Record, p. 156), which was overruled,

July 22, 1876.—The Trustee filed its motion (Record p. 156), for the vacation of all orders theretofore made in the cause (in the State Court) for the payment of claims for labor and supplies, but there having been at no time since his appointment, any funds in the hands of the Receiver applicable under any of the previous orders of the State Court, to the payment of any class of the indebtedness of the company, and an order having been formally entered (Record, 92), applying absolutely all moneys first to the payment of the indebtedness of the Receiver, the existing orders for the payment of the claims out of earnings became practically inoperative.

June 4, 1877.—John D. Howland and Livingston Howland were "appointed joint special Masters in Chancery for the District of Indiana and Southern District of Illinois, to take evidence and report the same, together with their findings thereon, to the court upon and relative to the several matters and issues hereinafter named."

5. To ascertain and report to the court the evidence, together with their findings thereon, touching the true and just amount due upon each claim or petition presented to the Receiver or the court for payment of labor, supplies and operating expenses performed for and furnished to said Indianapolis, Bloomington and Western Railway Company between the 1st day of June, A. D. 1874, and the date of the commencement of said receivership, *provided* that each claim or petition so presented to the Receiver or to the court shall state the exact date the indebtedness accrued, what the indebtedness accrued for, where the indebtedness accrued, and what amount thereof remains unpaid, and the claimant or petitioner shall make affidavit to the correctness of his said claim or petition.

July 24, 1877, without waiting for the coming in of the report of the Master respecting these claims for labor and supplies, the court entered the decree of sale, which contains the following :

14th. That of the purchase money not less than fifty thousand dollars, in addition to the hereinbefore mentioned deposit of fifty thousand dollars, shall be paid in cash on the day of sale, out of which two sums, amounting in the aggregate to one hundred thousand dollars, shall be paid all the costs, fees, allowances and compensation herein provided for, and the expenses of said sale, and on delivery of the deed so much more of the purchase money shall be paid into court in cash or certificates of Receiver's debt, as shall be necessary to pay and discharge the portion of Receiver's debts arising in the operation of the aforesaid main line of railroad, not hereinbefore described, to be assumed by the purchaser; *and that portion of all such other claims and sums of money* as shall be hereafter allowed by this court, and the Circuit Court of the United States for the Southern District of Illinois, in the case pending therein, hereinafter referred to, in preference to the liens of the hereinbefore mentioned mortgages or deeds of trust, for debts due by said railway company for work, labor, supplies, and material done and furnished during the six months next preceding the first day of December, 1874, in the operation of said main line of said railroad, which payment for debts due as last aforesaid for six months prior to December 1, 1874, shall be made into court without prejudice to the right of the Farmers' Loan and Trust Company, to object to the same, *and to appeal from any order or orders which may be hereafter made by the court, directing the money so paid to be distributed to the various claimants thereof.*

Owing to the uncertainty resulting from the fact that the questions concerning the claims for labor and supplies were still undetermined, no sale was made under the decree while it remained in that form.

November 7, 1877, the Masters filed their several reports showing the amounts of the several claims coming within the terms of the order of reference (Record, 230, *et seq.*).

In respect to the bulk of the claims held by those who make the present motion, the Masters report the following (Record, 242):

"They have received and considered thirteen hundred and seventy-one (1371) petitions or claims, and their action upon and disposition of each claim are indicated upon schedule accompanying this report, and which they make and ask to have accepted as part of the same, indicated for reference as Schedules 'A,' 'B,' 'C,' 'D,' 'E.'

"Schedule A embraces claims that have been examined and allowed in whole or in part upon evidence taken, or agreed statements, or by reference to the pay-rolls and books of the company. This schedule comprises the great body of the claims presented to the Masters. It aggregates in amount $305,104.33."

•

Other reports cover a small portion of the claims, but the foregoing is deemed sufficient for the purposes of the question now before the court.

These claims or petitions were not filed in the court in the first instance, but were presented to the Master or Receiver, as appears by the following stipulations (Record, 195):

"It is hereby stipulated that the several persons, firms and corporations, intervening petitioners, claimants herein, named in the decree of October 31, 1881, filed these several separate petitions with the Masters or the Receiver, in conformity with the requirements or provisions of the order of reference of June 9, 1877, and the extensions or modifications thereof entered on the 18th day of July, 1877, and the 18th day of September, 1877, except as to the claims of Peter F. Brice, filed with the Master, and the claim of Pullman Palace Car Company, filed with the court after September 1, 1877, the last named claim being filed on the 30th day of November, 1878, and also except * * * whose claims were filed with the court in October, 1881."

December 7, 1877. Exceptions were duly filed by the Farmers' Loan and Trust Company to the several reports of the Masters (Record, 276, *et seq*).

It does not appear by the record, but it is a fact which counsel will admit, that these exceptions came on for hearing before his Honor Judge Drummond, at Indianapolis in February, 1878, and after full argument covering the whole ground of the controversy, they were taken under advisement, and were never afterwards disposed of otherwise than by the decree now appealed from.

At that time an appeal was pending, involving the same general principles, in this court in the case of *Fosdick* v. *Schall*, which was an appeal from a decree rendered by Judge Drum-

mond, and it was understood by all parties that the court was reserving its decision until the law governing these questions should be settled by the Supreme Court of the United States.

For this reason, and on account of the great delays involved, the court, May 8, 1878, modifies its decree so as to provide (Record, 304).

"That said sale be made subject * * * to that portion of such other claims and sums of money as are now under consideration by, *and as shall be hereafter allowed by this court*, or the Circuit Court of the United States for the Southern District of Illinois, in the causes pending therein, *and affirmed by the Supreme Court of the United States on appeal*, should an appeal be taken, in preference to liens of the hereinbeofre mentioned mortgages or deeds of trust, for debts due by said railroad company, for work and labor done, and supplies and material furnished during a period not exceeding the six months next preceding the first day of December, 1874, in the operation of that portion of said railroad hereby directed to be sold, *without prejudice to the right of the Farmers' Loan and Trust Company to object to the same, and to appeal from any order or orders which may be hereafter made by the court in relation thereto*, * * * and such back pay, labor and supply claims as shall be finally adjudged against the property herein directed to be sold, after an appeal so taken, shall be assumed by the purchaser or purchasers, in addition to the amount of the purchase money so bid * *

And the payment of the amount of any claims so allowed, * * * shall not be required to be made at or prior to the time of the delivery of the deed, but the said sale shall be made subject to, and the purchaser or purchasers of said property shall agree to pay off so much of the said sums of money *as shall be finally allowed in the progress of this cause*, on or after such appeal, and the same shall be paid and discharged by said purchaser or purchasers within six months after the entry of an order of this court, upon a mandate of the Supreme Court concerning matters so appealed from being filed in this court, and the said deed shall be delivered without payment of said claims or sums of money, or any part thereof, upon the purchaser so *conditionally* agreeing to pay so much *and no more* of such claims and sums of money *as may be finally allowed on such appeal*."

October 30, 1878, the Masters sold the property under the decree to "Austin Corbin, Giles E. Taintor and Josiah B. Blossom, Purchasing Committee in trust for certain bondhold-

ers, under the trusts expressed in a certain agreement dated December 20, 1875, and a supplement thereto, dated July 25, 1878," copies of which are attached to and made part of the Masters' report (Record 311).

The agreements annexed to the Masters' report (Record 312, *et seq*) show the terms under which the Purchasing Committee was authorized to buy in the property on behalf of the bondholders at the sale, and provide for the organization of a new company and for the issue of new securities in lieu of the old.

It contains the following clause (322):

"The Purchasing Committee may, at any time prior to the sale, receive additional signatures to this agreement from outstanding bondholders, and subsequently thereto (upon) such other terms as to the said committee may seem meet."

As appears by the certificate of the Master (Record, 329) the Purchasing Committee held and paid into court, 1914 out of the 2,000 first mortgage D. U. B. & P. Co. bonds, and 2,809 out of the 3,000 first consolidated I. B. & W. bonds.

No share having been provided by the distribution in the decree for the second mortgage bondholders, the bonds of this class held by the committee were not paid into court; they, nevertheless, participated in the purchase under the provisions of the bondholders' agreements.

In the order for the delivery of the deed it was ascertained and stated by the court:

"that the amount of the Receiver's debts, arising in the operation of the main line of road of the Indianapolis, Bloomington and Western Railway Company, is assumed to be the sum of four hundred and seven thousand seven hundred and seven and $\frac{64}{100}$ dollars, in addition to certain unsettled and unadjudicated claims against the said receivership; that after deducting the available assets appearing to be in the hands of the Receiver, the amount of money required to pay off and discharge the portion of said Receiver's debts, including the said unadjusted and unliquidated claims arising in the operation of

the said main line of railroad, is the sum of *three hundred and sixty-two thousand dollars.*"

Upon the payment of this amount, as well as the amount of the capital stock, taxes assessed in Illinois against the main line (some $48,000), the Masters were authorized to deliver a deed.

It is to be observed that the original order appointing the Receiver, provided for the payment of these taxes before the application of any moneys to the payment of labor and supply claims.

The following was inserted in the deed (Record, p. 336):

"To have and to hold, unto them the said Austin Corbin, Giles G. Taintor and Josiah B. Blossom, Purchasing Committee, their successors and assigns forever * * * "also subject to that portion of such other claims and sums of money as are now under consideration by, and as shall be hereafter allowed by the said courts, or either of them, in the said suits, in preference to the liens of the hereinbefore mentioned mortgages or deeds of trust, for work and labor done and supplies and materials furnished during a period not exceeding the six months next preceding the first day of December, 1874, in the operation of that portion of the said railroad by the said decree directed to be sold; *but nothing herein contained shall be taken to prejudice* the (right of) the Farmers' Loan and Trust Company, or the said Austin Corbin, Giles E. Taintor and Josiah B. Blossom, their successor or successors and assigns, or any of them, to object to the same, *or to appeal from any order or orders* which may be hereafter made by the said courts, or either of them, in relation thereto, to the Supreme Court of the United States."

The estate conveyed was vested in the Purchasing Committee.

"*In trust, however,* for the holders of certain bonds, upon the trusts expressed in a certain agreement dated December 20, 1875, and a supplement thereto dated July 25, 1878, copies whereof are attached to the reports of sale filed in the said suits by the said Masters."

February 13, 1880, the decision of this court in the case of *Fosdick* v. *Schall*, having been announced, for the purpose of bringing these cases within the principles declared by this court in that case, the court entered the following order:

"Various parties having filed intervening petitions heretofore in this case claiming payment for work and labor done and for supplies and materials furnished to the railway company prior to the 1st day of December, 1874, it is ordered that the same be referred to William P. Fishback, Esq., Master in chancery of this court, and he is hereby directed to take testimony and report the same, together with his finding of facts, to this court upon the following points:

"1st. What amount, if any, was paid by the said company of the coupons on bonds of the main line and of the extension or interest thereon, from the first day of January, 1873, to the first day of July, 1874, and from the first day of July, 1874, to the first day of December of that year, and from what source the funds were derived, if any payments were made, whether from the income of the road or otherwise.

"2d. What amount, if any, was expended by the said company on the main line and on the extension during the times last aforesaid for permanent improvements, betterments, right of way or other real estate, new equipment and for construction, and if any such payments were made, what source from which the funds were obtained, and whether from income or otherwise.

"3d. What amount was expended by the Receiver on the main line or on the extension in permanent improvements, right of way or other real estate, new equipment, or for construction after the 1st day of December, 1874, and the sources from which the funds were obtained to make such payments, whether from income or otherwise.

"The Master in making his report upon the points heretobefore stated, shall discriminate, as far as practicable, between what may be considered the mere operating expenses of the railway, and what may be considered as permanent improvements or betterments or equipments of the road.

"4th. The gross earnings of the railway during the whole of the time before mentioned, namely, from the 1st day of January, 1873, until the Receiver relinquished possession of the property and in the divisions of time before mentioned, and what remained after deducting from those gross earnings, if anything, for necessary operating expenses, proper equipment and useful improvements, where any payments shall be found by the Master to have been made, he shall state in what the payments consisted, whether of cash or property, or equipment, and where taxes have been paid either by the company or by

the Receiver, the Master shall report for what, and the dates and amounts thereof. The Master shall also find and report what property was received by the Receiver on the 1st day of December, 1874, or afterwards, under the authority of the court, whether the same was real, personal or mixed, and also what property of the same character was surrendered by the Receiver to the purchasers.

"And it is further ordered by the court, that the Master may inquire into and report in relation to any other facts which in his judgment, he may deem material to the subject of inquiry covered by this order.

"And it is further ordered, that the Master shall have the right to receive and consider as testimony in this experience all of the testimony heretofore taken inthe matter of the intervening petitions and the pleadings thereon, so far as the same may be pertinent and applicable to the subject of inquiry presented by this order."

Under this order the Master proceeded to take testimony, and filed his report (Record, 390).

The report shows the Master to have been unable to find from the evidence, the facts which would enable him to make directly responsive answers to the questions referred to him.

It shows also that the claimants relied entirely upon the tables and schedules prepared by an expert from the books of the company, for proof of the facts involved in the order of reference.

This form of evidence was strenuously objected to by the respondents, as against them, who were entire strangers to these transactions, and they insisted that proof of the facts should be made in accordance with the ordinary rules of evidence.

Attention is now called to the report as showing the unwarrantable liberties taken by the officers of this company with its books (Record, 393). In responding to one of the questions, the Master says (Record, 408):

"In view of the *confusion* and *uncertainty introduced* into the accounts of this company *by the arbitrary*, and what seems to

the Master to be an *unwarrantable manipulation* of the accounts, the Master is unable to arrive at any satisfactory answer to the first branch of the question."

It is not considered essential to the consideration of the present motion that further reference should be made to the report, though many grave questions arise upon its face, which will be presented when the case comes to be heard.

June 16, 1881, the respondents, Austin Corbin, Giles E. Taintor, and Josiah B. Blossom, purchasers, and the Farmers' Loan and Trust Company, filed exceptions to the Master's report, stating the following exceptions:

"They except to all of said report, because the same is based upon incompetent and irrelevant testimony, to the introduction of which these respondents at the time objected.

And (B) to so much of said report as is based upon statements made up from the books and reports of the railroad company and of the Receiver, which were accepted as evidence against these respondents over their objection, without any competent evidence of the correctness of the entries in said books and reports, and in the face of evidence showing (as the Master finds) that said books and reports were not truly and correctly kept, but were manipulated and changed so as to show a result unfavorable to these respondents in this inquiry.

And (C) because said report upon the questions submitted does not find what the truth was, but only what is shown by said books and reports.

And (D) because said report is, upon several of the most important points of inquiry, incomplete, and does not give the court any sufficient facts upon which to base a finding or order.

2. To so much of the report of the Master in response to the first question as finds that any interest was paid after July 1, 1874, on the mortgage bonds of the company, or that any money was deposited after said date to pay interest, because the same is contrary to the evidence and is directly contradicted by the latter statements of the Master in his report.

3. To so much of the report in answer to said first question as states that the Master cannot tell whether the coupon interest paid between Jan. 1, '73, and July 1, '74, was paid out of the earnings or out of borrowed money or the proceeds of bonds sold, because the evidence shows, and the Master should have

so found, that none of said interest was paid out of the earnings of the company.

4. To so much of the report in answer to the second question as professes to give the amounts charged to construction and equipment on the books of the company in the two periods, because it is not responsive to the question, and is wholly irrelevant, and because the same is not correctly stated upon the evidence.

5. To so much of the report in answer to the second question as finds that there was paid out for construction and equipment from Jan'y 1, '73, to July 1, '74, $828,113.39, and from July 1, '74, to Dec. 1, 74, $59,951.31, because neither of said findings is supported by the evidence; but, on the other hand, there should have been deducted from the aggregate of these sums the sum of $383,131.56, which was shown by the evidence to have been charged to construction and equipment, when in fact it should have been charged to operating expenses; and because it further appeared from the evidence that other large sums charged to construction and equipment, and included in said aggregate, were not, in fact, properly so charged to operating expenses, and that the method of distribution of the bonds was arbitrary and false, and because the Master himself reports that he is unable to arrive at any satisfactory answer to the first branch of the question.

6. And to so much of said report in response to the second question as states that the Master is unable to tell from what source the funds were derived to pay the construction and equipment account, because the Master has found on page 35 of his report that he is of the opinion that the money borrowed was for the purchase of new equipments, and on construction account, and to pay coupon interest, and the evidence shows enough funds derived from loans and bonds sold to pay all these accounts.

7. To the entire answer of the Master to the third question, because it is not responsive to the question, and does not show or purport to show 'the amount expended for permanent improvements, right of way or other real estate, new equipment or for construction,' but includes in all of its statements large amounts expended for extraordinary repairs, as they are called, and other large amounts charged by the Receiver to maintenance of roads, cars and motive power.

8. To so much of the answer to said third question as includes in the tables given the items for extraordinary repairs, because repairs are, of necessity, operating expenses, and not permanent improvements or construction, and their character is not changed by the fact that they are extraordinary, and because the reparation of the injuries caused by floods, a hard winter, or by a previous neglect to make timely repairs is properly an operating expense, and should be so charged.

9. To the aggregate given by the Master in said answer, of the amount paid for betterments, equipments, &c., by the Receiver, because the same is too great and includes much that was ordinary operating expenses.

10. To the answer to the third question, because the Master has reported only the amount of money paid out by the Receiver for the alleged new equipment, betterments, &c., and has not inquired or found, as he ought to have done, the value of these things at the termination of the receivership and the transfer of the property; much of the life of the equipment, betterments, &c., having been expended during the receivership and returned in the shape of earnings, it is not right to charge the original cost thereof.

11. To the answer to the fourth question, because the Master has not taken into account a large amount of contingent and unsettled claims against the Receiver properly chargeable to operating expenses, and which are still unpaid.

12. To the answer of the Master to the said fourth question, because the Master has not included the taxes paid by the Receiver in his operating expenses, nor the taxes assessed upon the property and unpaid at the time of the sale of the road.

13. To so much of said report in answer to the fourth question as states the amounts of the operating expenses during the several periods prior to and during the receivership, because the Master has failed to include in said amount large sums which had been charged to construction and equipment and other accounts, but which were properly operating expenses, and should have been so charged, and because the amounts of the operating expenses as reported by the Master are much too small.

14. To so much of said report in answer to the fourth question as gives the amount of the gross earnings for the periods prior to and during the receivership, because the amount given for each of said is much too great.

15. To the answer of the Master to the fourth question, because he has not at all responded to that part of the question which calls upon him to give the amounts expended for 'proper equipment and useful improvements,' but has limited his answer to necessary operating expenses alone.

16. To so much of the report of the Master as finds that the general condition of the railroad equipment and property was improved, and the same increased in value during the receivership, because said finding is not sustained by the evidence, and is not responsive to any inquiry addressed by the court to the Master, and because such general improvement, if the same was proved, would in large measure only represent restoration or repairs."

October 31, 1881, the court entered its final decree (Record, 449), in which it is recited that—

"upon consideration of the several exceptions to the several reports of Special Masters, John D. Howland and Livingston Howland, upon the reference of June 4, 1877, and also of the several exceptions to the report of Master William P. Fishbac, upon the reference of February 18, 1880. * * * And the court, upon the said reports and the evidence therewith, finds that within the period named in said order of February 18, 1880, the earnings of said Indianapolis, Bloomington and Western Railway Company that ought to have been applied to the payment of the several claims hereinafter referred to were diverted to the payment of interest upon the bonded indebtedness of such railway company, additional equipment purchased for, and lasting and valuable improvements made upon said railway, to the amount of five hundred and eighty-seven thousand dollars."

"The court further finds that by reason of the fact that by the various decrees hereinbefore entered, the several amounts so to be paid, are to be paid by Austin Corbin, Giles E. Taintor and Josiah B. Blossom, Purchasing Committee, as the remainder of the purchase money for the main line of said railway under the decree and various orders of court rendered and entered heretofore in this cause."

And so far as the claims filed by the appellees making this motion are concerned, the court decreed (Record, 454):

"The court does, therefore, upon the facts so found * * * order, adjudge and decree that said Austin Corbin, Giles E. Taintor and Josiah B. Blossm, do, within sixty days, exclusive of Sundays, from and after the date of this decree, pay to said several intervening petitioners the several amounts set opposite their respective names."

Then follows a list of amounts aggregating upwards of four hundred thousand dollars.

The appellants' excepting and objecting to the findings of the court, and to the order and decrees for the payment of the said moneys, prayed an appeal to the Supreme Court of the United States which was allowed in open court, and the appeal was filed and approved (Record, 499).

Later the appellants filed the proper bond and a proper *supersedeas* order was entered.

Although the case was not returnable here until the next term, a full transcript of the whole record has been filed in this court, and for the purpose of facilitating the appellees in presenting their motion to dismiss, so much of the record as appellees desired has been voluntarily printed by appellants.

The transcript filed contains the whole record *and all the evidence*, or stipulations in lieu of such parts as are omitted by consent of the parties, and at the hearing on the merits will present all the questions which inhere in the case.

At the hearing the appellants will contend that the record shows that:

1. The facts do not exist which authorize the court to appropriate the proceeds of the sale to they payment of claims for labor and supplies as against these mortgages, under the principles announced by this court in *Fosdick* v. *Schall*, and other cases.

2. That there is no competent or legal evidence of any diversions by the old company for the benefit of the bondholders, either by way of payments of interest, or the making of lasting and valuable improvements.

3. That as matter of fact it appears that all the interest paid on new work done was paid for out of borrowed moneys, and the proceeds of bonds sold and hypothecated, and no part of it out of earnings.

4. That there were no net earnings in the hands of the Receiver at any time, applicable under the order of appointment, to the payment of these claims.

5. That all the "*lasting and valuable improvements*" made by the Receiver under the order of the court, were more than overbalanced by the outstanding obligations of the Receiver at the time of the sale, and which were paid out of the proceeds of sale.

6. That the order for the payment of the claims is not warranted by the law or the facts, and is in violation of the terms upon which the sale was made under the decree.

Numerous questions also arise upon the proper construction and application of the several orders and decrees, and amongst them this, that while the decree under which the appellants purchased and upon which they had a right to rely, provides in distinct and express terms, that the sale should be made subject only to such of these claims, as were *then* under consideration by the court, and arose during the sixth months next preceding December 1, 1874, and while the purchasers had the right to suppose that the court, in ascertaining the fund applicable to the payment of such claims, would only take into account the improper and inequitable diversions of earnings by the old company for the benefit of its bondholders during the same period, nevertheless, the court has based its order for payment upon the alleged diversions, occurring during a period of *two years* prior to the receivership. Hence, we shall contend that the order is in direct violation of the terms of the decree under which the sale was made. And moreover, the court has increased the amount of the claims, by allowing numerous claims and large amounts which were for the first time presented long after the sale.

ARGUMENT.

I.

This court has jurisdiction of this appeal, the amount in controversy being in excess of five thousand dollars, exclusive of costs.

In discussing this branch of the question, we forbear to burden the court by a wearisome citation of the precedents which are repeatedly brought to the attention of the court at every term, and with which each member of the court must be as familiar as with the alphabet.

It is contended that the appeal should be dismissed as to each of these claimants whose allowance is for a less sum than $5,000, because each of the claims is in the nature of a separate, several and independent suit against the mortgagees or the purchasers, and because the orders for the payment of the claims are separate, several and distinct.

Nothing can be more obvious than that the jurisdiction of this court is not to be affected by matters of mere form. No astuteness or ingenuity in the framing of proceedings or the drafting of orders and decrees will be permitted, either to deny or confer jurisdiction. This court will look only to the nature of the substance of the controversy in determining the question.

It is well settled in this court that the mere fact that an order for the distribution or payment of money to several claimants is in form for several sums less than five thousand dollars, does not take the case out of the jurisdiction of this court on appeal. The cases of *Shields* v. *Thomas*, 17 How., 3; *Rodd* v. *Heart*, 17 Wall., 354, and *The Connemara* 103, U. S. 754, are decisive on this point.

Here, as in *Rodd* v. *Heart*: "It is apparent, that no one of the claims allowed exceeded $5,000, yet the claim of the appellants," which is practically and effectually disallowed, "exceeds that sum."

The claim of the *Farmers' Loan and Trust Company* is, that its mortgage liens, amounting to $5,000,000, are entitled to be first fully paid out of the proceeds of the sale, and out of the funds arising from the operations of the road during the receivership, before any payment should be made to any other claimant. The order of the court, in effect, disallows this claim to the extent of upwards of *four hundred and twenty-five thousand dollars*, and that is the measure of the value of the controversy as to the appellants. "It is matter of no concern to" them how the money "which is denied to them was appor-" tioned among" the claimants. "The decree *is in legal effect one decree* in favor *of all the* "*claimants*," they having as between themselves unequal interests.

And so, so far as this question of amount is concerned, it is the claim of the purchasers, that by the terms of the decree under which they purchased this property, neither the facts nor the law warrant the order by which they are obliged to pay this sum of upwards of four hundred and twenty-five thousand dollars, and that aggregate sum is the measure of the value of the controversy to them, and they are equally indifferent in every legal and proper sense, both as to the persons and the sums named in the order. It is not sufficient to say, as argued by counsel, that the purchasers have assumed to pay these claims, and cannot be heard to deny it. That is simply begging the question. The amount being sufficient, we are entitled to ask this court to consider the decrees, and to determine their legal effect. That is a question which can only properly be determined by the court at the hearing, unless the appeal should appear to the court to be frivolous, and as that question has not been made by counsel in argument, we shall not now occupy the attention of the court by discussing it.

In our judgment there is no single point of analogy between the present case and those for seaman's wages, salvors for salvage, and the like cited and relied upon by counsel, where separate and several distinct claims are permitted to be joined from motives of convenience and economy. It is obvious that there is no suit or proceeding known to the law which these claimants might or could, under any circumstances, have commenced or prosecuted against either or all of these appellants for the recovery of these claims. If the defendant, the Indianapolis, Bloomington and Western Railway Company were the appellant here, and should undertake to dispute the correctness of the decree in fixing the amount due the several claimants, then there would be strong ground for the argument presented here. But that is not this case. The appellants do not dispute and never have disputed the correctness of the amounts fixed by the court. They have not now, and never had, any controversy with the individual claimants. The appellants' controversy is with all of them together, and the question is whether in fact and in law, a fund exists out of which these claims may lawfully be paid. If the fund does exist, appellants have not the slightest interest in the distribu-

tion of it. That distribution discharges no obligation of theirs.

It is not to be forgotten that the appellants and appellees are the creditors of a common debtor, each claiming the whole of the fund; and so far as this controversy is concerned, at least, the appellees are claimants under a right which is common to them all, and in which they have a common and undivided interest, that is to say, the right derived from and through the alleged diversions made by the old company for the benefit of bondholders, or, as the case may be, the right derived from the order of appointment taking the net earnings of the receivership from the bondholders, and appropriating them to the payment of the floating obligations of the company.

All the force that can be given to the views in support of this motion is derived from the mere forms by which the court saw fit to enforce its judgment. If the form of the decree had simply been such as to finally require the appellants to pay into court the aggregate sum for distribution to and amongst the floating debt creditors of the company—and it might quite as well have taken that form—leaving the matter of distribution, in which the appellants have no interest whatever, to depend upon the determination of such controversies as might exist between the several claimants, there would have been no basis for the reasoning by which this motion is supported. In such a case—that of a final order against the appellants to pay into court the gross sum of four hundred and twenty-five thousand dollars and upwards—can there be the slightest question but that they, being aggrieved by the order, would have the right to call it for review before this court? And, inasmuch as that is the practical and substantial effect of the existing order, is the right of appeal which justly inheres in the nature of the substance of the controversy to be taken away by the mere ingenuity of device in the forms that are employed?

There is the obvious fallacy in the reasoning of the counsel, that they advance from the assumption that the case is to be considered as though appellants represent the railroad company in the controversy, and that because appellees have had separate and several claims against it, they are to be treated as though they have separate and several claims against the

appellants, whereas, they have no claim against the appellants of any kind. Appellees are claimants merely against a fund, or, what is equivalent to a fund, the whole of which appellants insist belongs to them.

But counsel say there is no fund in court, we reply:

That is but a mere matter of form, and is not of the substance of the matter. If this court has jurisdiction on appeal from a final order, compelling appellant to produce the fund in court for distribution, it also has jurisdiction of an order for the payment of the amount of the fund to the several claimants, because the jurisdiction of this court is not to be taken away by matters of mere form.

To determine otherwise, we respectfully suggest, would leave the rights of parties and the jurisdiction of this court to depend in many cases, upon matters of accident, rather than upon the Constitution and laws of the United States.

Confident that every consideration based upon the real and substantial nature of the controversy, and the practical legal effect of the orders of the court below, will sustain the jurisdiction of this court, so far as the question of amount is concerned, we submit this branch of the question.

II.

It is claimed that the appeal should be dismissed, because the several intervening petitioners named in the motion have not been named as either appellants or appellees upon the docket of this court, or in the transcript filed herein.

The appeal in this case was prayed and allowed in open court at the time the order passed for the decree, so that no process of citation is required to bring the several persons benefited by the decree appealed from before this court. The appellants aggrieved by this decree are fully and properly named

and described in the record. And, according to our understanding, all the parties benefited by the decree, or who should be parties to the appeal, are properly before the court, or rather, they will be on the first day of the next term. The transcript on file names all the parties to the suit, and all persons benefited by the decree appealed from as fully and properly as the same appears in the court below.

The appellants have done all in their power by presenting the record, and it is not their fault if the clerk of this court has omitted the form of copying the names of the appellees fully on the docket. The dockets and records of this court are not in the control of the appellants.

So far as the form of the bond is concerned, running as it does to the Clerk of the Circuit Court of the United States for the District of Indiana, "for the use and benefit of whom it may concern," that is the precise form dictated by the learned judge below, who directed the *supersedeas* order to be entered. Appellants presented to the learned judge two bonds for his approval, one in the form approved by him and filed, and the other naming individually each of the distributees named in the decree. If deemed by the court material, we ask that an order be entered granting leave to file affidavits in proof of this fact. This latter bond is filed and presented to this court for its approval now, in case it is deemed necessary for the protection of the appellees.

Allusion is made in argument to the petition for the *supersedeas* order, and the statement is made that it does not name the appellees.

That is quite true, but we call the attention of the court to the fact that the petition for *supersedeas* is no part of the process of taking or perfecting the appeal. The appeal was prayed and allowed in open court, and was perfected at the time by filing the ordinary cost bond in accordance with the order of the court (Record 499), and this effectually removed the case into this court.

The application for *supersedeas* was *subsequently* made, and forms no part of the procedure of the appeal.

No such petition was necessary in obtaining a *supersedeas*

order, and it was only filed to make substantial proof accessible of an application to the learned judge below, in case application should subsequently be necessary to one of the justices of this court.

The appeal having been orally prayed in open court, and its allowance then noted on the record, there is no paper to be filed by the appellants in which the appellees should be named, except the formal assignment of errors, which, in our judgment, ought not and could not be taken to cure the defect, if one exists, or be made the basis for an order to dismiss for the omission of the names of all the parties.

At the time this case was docketed the writer was engaged in the preparation of a formal assignment of errors, but owing to the delay required by the care and accuracy necessary in copying a list of upwards of eleven hundred names, it was suspended, so as not to delay the appellees in making this motion, who were anxious to have it presented at the present term.

We understand that the provision of the statutes for an assignment of errors and prayer for reversal is held by this court to be merely directory, and to be sufficiently complied with by conforming to the rules of the court at the time of filing the printed brief. *Phillips' Practice*, ed. 1878, p. 241.

The cases cited by counsel in support of the proposition that the names of all parties whose rights are to be adjudicated must be stated upon the record, are not applicable. Here the names of the parties *do appear by the record*, for the same record which shows the allowance of the appeal shows also the decree appealed from, and the names of the persons benefited by it, who should be heard here in support of it. This court has never decided that the names of all the parties must appear on the court's *docket*.

That these claimants have never been parties to the suit in any proper sense, does not deprive this court of jurisdiction over them on appeal. If they are parties for the purpose of

taking the benefit of the order appealed from, they must also be parties for the purpose of giving this court jurisdiction to review that order.

The defect, if it exists, is one of mere form, and the "accompanying record" affords the evidence whereby it can be remedied. As there is no proceeding to be taken by the court below, we ask the court to make the necessary orders for such amendments here, as the nature of the case may require.

III.

Appellees state, as one ground of their motion to dismiss, that the Farmers' Loan and Trust Company is one of the appellants, and has no interest in the appeals.

In the first place, we desire to suggest that even if the court should find that the Farmers' Loan and Trust Company has no interest in the controversy, the appeal should not be generally dismissed if the other appellants may prosecute their appeal. For, it appears by the record, that they prayed their appeals separately and severally, so that if the appeal of the trustee should be dismissed, it does not follow that the other appellants are not properly here.

But it is not true that the Farmers' Loan and Trust Company has no interest in the question. Nor is it true, as asserted, that the decree of sale determined and finally adjudicated the rights of the trustee in the property.

We ask again that the court shall look into the nature of the controversy, and not simply at the forms by which the court has in substance and effect taken upwards of four hundred thousand dollars from their *cestuis que trust*, and appropriated it to the unsecured floating debt creditors of the company. The trustee, representing the holders of $5,000,000 of bonds, and a large amount of accrued interest, secured by

deeds of trust filed its bill praying for a sale of the property pledged, praying that the entire proceeds of sale, together with all the earnings, should be applied to the payment of the debt which it represented. It prayed further that the sale should be so made that its *cestuis que trust.* might bid in the property, unencumbered by the conflicting claims of others. Instead of complying with its demands, the court decreed that the purchasers of the property should pay into court an amount sufficient to pay "that portion of such other claims and sums of money as shall be hereinafter allowed by the court in preference to the liens of the hereinbefore mentioned mortgages, for debts due by said railway company," &c., "*without prejudice* to the right of the Farmers' Loan and Trust Company to object to the same, and to appeal from any order or orders which may be hereafter made by the court directing the moneys so paid to be distributed to the various claimants thereof."

So far, at least, the trustee must be taken to have preserved its right, to insist upon the distribution of these moneys to the payment of its bonds, and to appeal from any order or decree by which the moneys should be diverted elsewhere.

But counsel say this was a final decree, and no appeal having been taken, it must be taken to have been adjudged that these claims were prior and superior to the lien of the mortgage. We deny that it was in any sense final as to this question.

It must not be forgotten that at the date of the decree, none of these claims had ever been filed in the suit; they did not come in for months after this, upon the coming in of the Masters' reports. Notwithstanding the decree, the court might have still appropriated the whole of the money to the complainants. It left the question wholly undetermined whether any amount would be finally allowed. It was wholly undetermined at that time whether there had been any unlawful diversions from net earnings by the old company; indeed, no inquiry was directed upon that question for several years after the date of the decree. It also left undetermined wholly the

question whether there were or would be net earnings in the hands of the Receiver.

In short, the whole question was designedly left open by the court for future consideration, *without prejudice* to the right of the trustees to appeal from the subsequent order when it should come to be made, if at all.

Notwithstanding the express terms of the decree, and the solemn declaration of the court saving these rights, counsel now insist that the right *is* prejudiced and barred because the court waited for more than four years before entering its final order, thus permitting the time to elapse within which an appeal might be presented. We do not believe any such strained and technical construction of these clauses will be applied.

Afterwards, the bondholders having perfected their arrangements to buy in the property at the sale, and it being impossible to determine in advance of the sale, without ruinous delays, the amount applicable to the payment of these claims, the court modified its decree by making the sale subject to the payment of the claims when the amount, if anything, should be subsequently ascertained, and this order was also (Record, 304) "*without prejudice* to the right of the Farmer's Loan and Trust Company to object to the same, and to appeal from any order or orders which may hereafter be made by the court in relation thereto."

Here also the court has made a part of the decree a reservation of the right of the trustees to take this appeal.

Nevertheless the counsel insist that the court has, by the form of the procedure, notwithstanding the declarations of its decrees, not only prejudiced but absolutely defeated the right of appeal.

The trustee has expressly reserved, and the court has saved, its right to assert its claim for the benefit of its *cestuis que trust.* who became the purchasers at the sale.

Discarding the technical form of the procedure, and looking to its substance, the holders of these bonds, the *cestuis que trust.*

of the trustees, have been denied by the court the full benefit of the lien of their mortgages, against the protest and objection of their representative, who now appeals to this court, under the right expressly reserved in the decrees, to review the proceeding by which it has been done.

The interest of the trustee is as great as it ever was, and the right to represent these bondholders has been always preserved in the decrees.

To deny the right of appeal from these orders now, is simply to deny the power of the Circuit Courts to speed a cause by disposing of matters that are not in controversy and by reserving the questions that are in controversy.

It must be admitted that the course of procedure pursued by the court was somewhat irregular, but it was adopted in the interest of justice in the best sense, and with the disposition to adopt the best means for the conservation of the property for the benefit of all concerned. This being its spirit and motive; the purpose of saving to all parties their right to a full hearing in this court, it seems to us should rather be favored and encouraged, than defeated by the application of supposed technical rules, which go only to the form and not to the substance of the matter, and which are invoked here in support of the motion.

IV.

It is claimed also that the appeal should be dismissed because the Purchasing Committee have taken an appeal, and are not parties to the suit.

If their right as bondholders can be fully protected by the appeal of the trustee, to contest the real matter now in controversy, perhaps it was unnecessary that they should have taken an appeal. But however that may be, they are the parties that have been ordered to make the payment of these claims, and if they "have been subjected to the jurisdiction of

the court, and made liable to its orders and decrees," "they have the corresponding right to contend against all claims made against them." *Hinckley* v. *Gilman R.R. Co.*, 94 U. S., 469.

They will contend here at the hearing that, while under the terms of the decree they should pay such of these claims as should be ultimately allowed by the court, it was not left to the arbitrary discretion of the court to determine the amount they should be compelled to pay, but that the amount to be paid should be determined by reference to the principles of law governing questions of that nature, and upon the facts legally established upon judicial inquiry; and that upon a just application of those principles to the facts of this case and the processes by which the inquiry was conducted in the court below, there is no warrant either in law or in equity for the order or decree for the payment of these moneys.

This involves a question of construction which these appellants insist they have a right to submit to the consideration of this court on appeal, and which is not to be disposed of upon a summary motion to dismiss.

Attention is also called to the order made by the court for the deed to the purchasers, which embodies the form of the deed, and contains the following (Record, 336): "But nothing herein contained shall be taken to prejudice the (right of) * * the said Austin Corbin, Giles E. Taintor and Josiah B. Blossom, their successors or assigns, or any of them, to object to the same" (*i. e.*, the allowance of the claims now in controversy) "or to appeal from any order or orders which may hereafter be made by the court in relation thereto, to the Supreme Court of the United States."

We contend that the original decree and the modification were not final in any sense in respect to this question; that in determining the amount to be allowed for the payment of claims for labor and supplies, the court should only have based its decrees upon the amount of the unjust diversions made by the old company, and the net earnings of the receivership, in accordance with the principles declared in *Fosdick* v. *Schall* and other cases; and that the court in fixing the

amount has erred, both in matters of law and matters of fact. On the other hand, the appellees contend, in support of the motion, that the decrees were final as to every question, except as to the amount of the liabilities of the old company due to the several claimants, and that the purchasers were absolutely bound to pay the amount when fixed by the court, whether the law and facts of the case warranted their allowance or not. This, we submit, is a question which these appellants have the right, on general principles, as well as in virtue of the express reservations of the decrees and orders themselves, to submit to the consideration of this court, and to take and prosecute their appeal for the purpose of removing the case here for that purpose.

In conclusion, we have to add that we do not deem it either necessary or proper to reply to what is stated in one of the briefs concerning the hardships supposed to result from the due and regular administration of justice in this case, because no hardship can ever result to any litigant from the submission of his claims and pretensions to the constituted tribunals of the law.

Respectfully submitted,

J. D. CAMPBELL,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

THE FARMERS' LOAN AND TRUST COMPANY, AUSTIN CORBIN, GILES E. TAINTOR AND JOSIAH B. BLOSSOM, APPELLANTS,

vs.

CHRISTIAN WATERMAN AND OTHERS, APPELLEES.

Appeal from the Circuit Court of the United States for the District of Indiana.

MOTION TO AFFIRM DECREE,

—AND—

BRIEF

IN SUPPORT OF SAID MOTION.

BY JOHN M. BUTLER,

Solicitor.

CARLON & HOLLENBECK, PRINTERS, INDIANAPOLIS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

THE FARMERS' LOAN AND TRUST COMPANY, AUSTIN CORBIN, GILES E. TAINTOR AND JOSIAH B. BLOSSOM, APPELLANTS,

vs.

CHRISTIAN WATERMAN AND OTHERS, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

MOTION TO AFFIRM DECREE.

The appellees, and all intervening claimants named in the decree from which this appeal is prosecuted, come now, by their solicitors, and move the court to affirm the decree of the court below, on the following grounds, namely:

1. That although the record may show that this court has jurisdiction, as to the decrees in favor of some,—or all,—of said appellees and intervening claimants, it is manifest that the appeal was taken for delay only.

2. That the question on which the jurisdiction depends,—as to any one, or all, of said appellees and intervening claimants,—is so frivolous as not to need further argument.

Said appellees and claimants pray that this motion may be united with, and considered in connection with, the "motion to dismiss appeals and vacate supersedeas as to all intervening petitioners in whose favor sums less than five thousand dollars, are severally decreed," submitted to this court on April 24th, A. D., 1882.

Respectfully submitted,

McDONALD & BUTLER,
CLAYPOOL & KETCHAM,
Solicitors for appellees and Intervening Claimants,
By JOHN M. BUTLER.

June 29, 8882.

BRIEF.

The statement of facts contained in the brief filed by me in support of the motion to dismiss, submitted on April 24th, 1882, is equally applicable to this motion. Without repetition here we beg to refer the court to that statement for the history of this litigation. Notwithstanding the criticism of counsel for appellants, a careful re-examination and comparison with the printed record has confirmed our belief in the correctness of every material averment of that statement. The record is cited in support of each material fact stated, beginning with the original order appointing a receiver. It was not deemed necessary to cite the record in proof of the historical facts preceding this litigation. Counsel for appellants calls attention to the fact that a part of the order extending the receivership to the cross bill of The Farmers' Loan and Trust Company is omitted from the record of the case in the Indiana State Court. Counsel will not deny the fact that while the cause remained in the State Courts of Illinois and Indiana, substantially all the litigation actually took place in the Illinois State Court, the understanding being that accurate duplicates of all orders entered in the Illinois State Court should be entered

in the Indiana State Court. This was done in almost every instance, but in a few cases was not done, through mistake or oversight. For the express purpose of curing and correcting these errors and omissions in the Indiana record, a stipulation was entered into and inserted in the decree from which this appeal is prosecuted, making any part of the Illinois record omitted from the Indiana record to be and become a part of the Indiana record with the same force and effect as though originally entered therein. [Record p. 498.] A comparison of the two orders [Record p. 90] shows clearly that the Indiana order is simply an *incomplete copy* of the Illinois order, which by the stipulation above cited is now a part of the Indiana record.

Counsel for appellants protests against the statement that these various orders and decrees entered during the progress of the cause were *consented to* by the Farmers' Loan and Trust Company. We have always understood that when orders and decrees are entered in open court, in the presence of all the parties and their counsel, and *no objection or exception whatever is reserved*, such orders and decrees are regarded as consented to by the parties in interest. Whether right or wrong in this supposition, it is certainly true that the modification of the final decree of foreclosure and sale, rendered May 8, 1878, *was consented to and procured by the Farmers' Loan and Trust Company.* The record affirmatively proves this. [Record, p. 304.] It is equally true that the original final decree of foreclosure and sale, rendered July 24, 1877, *was consented to and procured by the Farmers' Loan and Trust Company.* [Record, pp. 213 to 224.] The fact that no appeal has been prosecuted from either the original final decree, or the final decree as modified, or from the decree confirming the sale, made under the final decree as modified, proves conclusively that these several decrees—which are the all important ones to consider in connection with the motions to dismiss and affirm—*were satisfactory to the Trustee.* The

final decree contains these words: "And it is further ordered that any of the parties to this action may apply to the court for such other or further directions at the foot of this decree as may be necessary to carry it into effect, *no question being reserved except the question as to the amount of the claims or sums of money to be allowed as provided in the fourteenth clause of this decree; and so far as the same shall be passed upon by the court, such allowance or disallowance shall take effect as if now incorporated in and passed upon by this decree.*" [Record, p. 223.] These words *exclude* every other question and right adjudicated by the decree from future consideration. They make the *rights* and *priorities* of the different classes of creditors as fixed and determined by the terms of the decree, ABSOLUTE. By these words *all parties* to that decree are BOUND. That decree can not now be questioned. We desire in this connection to refer the Court to the 1st, 3d, 4th and 7th sections of the argument filed by me in support of the motion to dismiss, submitted April 24, 1882, as applicable also to this motion to affirm. The motion to dismiss includes 1149 several claims. This motion embraces ALL of the several claims set forth in the decree of October 31, 1881, including *fourteen claims* not covered by the motion to dismiss, each of said fourteen claims being for a sum exceeding five thousand dollars.

In support of this motion to AFFIRM we desire to submit the following suggestions:

1. The foreclosure decree rendered July 24, 1877, [Record, pp. 213 to 224]—as modified by the supplemental decree rendered May 8, 1878, [Record, pp. 304, 305]—is a FINAL DECREE and settles absolutely all *rights* and *priorities* determined and adjudicated by said decree. Especially is this true when we show further that the property was *actually sold* under that decree, the sale was *confirmed* by a decree from which no appeal has been prosecuted, and

the proceeds of sale have been distributed according to the foreclosure decree.

Whiting v. *Bank of U. S.*, 13 Peters, 15.
Ray v. *Low*, 3 Cranch, 179.
Forgay v. *Conrad*, 6 Howard, 204.
Bronson v. *Railroad Co.*, 2 Black, 529.
Thompson v. *Dean*, 7 Wallace, 346.
Stoval v. *Banks*, 10 Wallace, 583.
Railroad Co. v. *Swasey*, 23 Wallace, 409.
Sage v. *Railroad Co.*, 6 Otto, 714.

2. By the terms of this foreclosure decree the *only question* reserved is "the question as to the *amount* of the *claims* or *sums* of money to be allowed" to these claimants. [Record, p. 223.]

The right of these claimants to be paid—whenever the several amounts due them should have been ascertained,—*was fully and finally adjudicated by this decree*, now more than four years old. The *security* for the payment of these claims was provided by this decree, by providing that the property should be sold *subject to these claims.* [Record p. 304]

3. The property was sold under this final decree, subject to the payment of these claims. The sale was confirmed by a decree rendered December 23, 1878, from which no appeal has been prosecuted. [Record p. 327.] The *proceeds of sale* have been distributed pursuant to the terms of decree. [Record pp. 327, 329, 334, 335.] The decree of foreclosure, and the decree confirming the sale made under and pursuant to the foreclosure decree, finally foreclose and adjudicate every question involved in the litigation *excepting one.* The only question left open and unadjudicated is set forth in the decree in language too clear and explicit to admit of controversy, viz.: "NO QUESTION BEING RESERVED *except the question as to the* AMOUNT *of the* CLAIMS *or* SUMS *of money to be allowed* as provided in the fourteenth [by the modification of the decree May 8, 1878—Record pp. 304

305—this word '*fourteenth*' should now read '*thirteenth*'] clause of this decree, and so far as the same shall be passed upon by the court, such allowance or disallowance shall take effect as if now incorporated in and passed upon by this decree." [Record p. 223.]

The only question adjudicated by the decree of October 31, 1881 [Record pp. 449 to 499], from which this appeal is prosecuted, is this same question reserved by the final decree of foreclosure. This decree appealed from simply *determines the several amounts due on these several claims, and directs their payment in accordance with the terms and provisions of the foreclosure decree.* [Record pp. 450, 454.]

The foreclosure decree adjudicated the legal and equitable *status* of these claims, determined the rights and priorities of these claimants, and decreed who should pay them, when the amounts due them had been ascertained by the court. [Record pp. 221, 222, 304, 305, 336.] The controversy, therefore, is limited to the question of *the amounts due on these several claims.* All other questions are forever settled by a final decree consented to at the time, now four years old, and never appealed from.

4. The Farmers' Loan and Trust Company has no possible interest in this question, and has no right to appeal from the decree of October 31, 1881.

FIRST: The Farmers' Loan and Trust Company, as trustee of the two mortgages upon which the foreclosure decree and sale were based, asked for, *consented to,* and procured a decree to sell the railway covered by its mortgages, SUBJECT TO THESE CLAIMS, [Record pp. 304, 305.] thereby agreeing to accept in full satisfaction and discharge of its mortgages, the amount for which the property would sell at public sale *subject to these claims.* The foreclosure decree merged the mortgages and bonds represented by the trustee. Under this decree, this trustee procured the property to be sold *subject to these claims,* and procured the *proceeds of sale* to

be paid out and distributed to its bondholders, pursuant to the decree. [Record pp. 327, 329, 335.]

The sale under the decree, and the payment and distribution of the proceeds of sale, forever satisfied and discharged the decree as to all the rights and interests of the trustee, and the bondholders represented by the trustee. Whether these claims are paid, or defeated, is a matter of no interest to this trustee; its mission and interest in this suit ceased finally when it received and distributed the proceeds arising from the sale of the property under its foreclosure decree. If every one of these claims were defeated, the Farmers' Loan and Trust Company would not thereby procure another dollar for distribution to its bondholders.

SECOND. *There is no decree here against the Farmers' Loan and Trust Company.* Nothing is required of it. It is not a party in interest. Only parties having a substantial interest, affected by a decree, can appeal from that decree.

Ex parte Cutting, 4 Otto, 22.
Speer v *Place*, 11 Howard, 526.
Bayard v *Lombard*, 9 Howard, 551.
Payne v *Niles*, 20 Howard, 220.

We therefore ask that the decrees of October 31, 1881, may be affirmed as to appellant, the Farmers' Loan and Trust Company.

5. The appellants, Austin Corbin, Giles E. Taintor, and Josiah B. Blossom, are bound by all orders and decrees rendered by the court in the cause, prior to their purchase, and can not question them, or appeal from them.

They stand before this court *solely as purchasers.* Their right to appeal *is limited strictly to proceedings subsequent to their purchase.* They can not be heard to question matters and rights adjudicated and decreed *prior* to their purchase. *Blossom* v. *Milwaukee and Chicago Railroad Company*, 1 Wallace, 655; *Hinkley* v. *Gilman, etc., R. R. Co.*, 4 Otto, 469.

The only decree rendered in the cause *subsequent* to the purchase by these appellants, is the decree of October 31, 1881, which, as has already been shown, *simply determines the amounts due on these several claims, and directs their payment in accordance with the terms of the final decree rendered long before these appellants purchased the property.* The decree of May 8, 1878, determined and decreed that *these claims shall be assumed and paid by the purchasers,* when finally ascertained and adjudged. [Record, p. 304.]

The deed accepted by these purchasers contains the same provision. [Record, p. 336.] The decree of October 31, 1881, shows on its face that in directing these purchasers to pay the several sums found and decreed due, it makes *no new adjudication,* but simply executes the decree of May 8, 1878. [Record, p. 450.] The only question adjudged *since the purchase by these appellants,* is the question of THE AMOUNTS DUE ON THESE SEVERAL CLAIMS; hence, THAT is the only adjudication *they* can be heard to question. To permit them to present *any other question,* would be to permit them, under cover of the decree of October 31, 1881, to present questions *finally adjudicated* long PRIOR to their purchase, and to review *final decrees,* that have stood more than four years without any appeal having been prayed or prosecuted.

6. Having established these points, to wit:

FIRST. That the foreclosure decree of July 24, 1877, with the modification thereof of May 8, 1878, is a FINAL DECREE.

SECOND. That that final decree determined all rights and priorities, and *adjudicated* all questions involved, *excepting only "the amount of the claims or sums of money to be allowed" to these claimants.*

THIRD. That the decree of October 31, 1881, from which this appeal is prosecuted, *adjudicates no question,* save the single question reserved by the foreclosure decree, viz.: *the amounts due on these several claims.*

FOURTH. That the Farmers' Loan and Trust Company *has no interest* in the defeat, or payment, of these claims; has no decree here against it; is in no manner affected by, and has no right to appeal from, the decree of October 31, 1881; and,

FIFTH. That appellants, Corbin, Taintor and Blossom, stand here solely as purchasers, bound by all decrees and orders rendered *prior* to their purchase, and can, therefore, only be heard to question the correctness of *the several amounts decreed to these several claimants by the decree of October 31, 1881.*

We submit that it is clearly manifest that the appeal is simply for delay, and that the only question on which the jurisdiction depends,—the only question raised by the appeal,—is so frivolous as not to need further argument.

FIRST. The record affirmatively shows that appellants substantially admit the correctness of the amount decreed to each claimant named in the decree of October 31, 1881, excepting only *two* several claims.

There are 1163 several amounts decreed against the appellants, Corbin, Taintor and Blossom, purchasers of the Main Line of the I., B. & W. Ry. Of this number 1151 are covered by a stipulation of record by which it is stipulated that these 1151 claimants duly filed their several claims in conformity with the requirements of the order of reference,—which required each claim to be verified,—except that in a few cases named in the stipulation, the petitions were, by leave of Court, filed *after* the time named in the order of reference,—and by which it is further stipulated *that these several petitions were for claims for supplies, materials and labor actually furnished to, and performed for, the Company in the operation of its railway* within the six months next preceding the appointment of the Receiver. [Record, pp. 195, 196].

This stipulation was entered into at request of appellants; by it these 1151 petitions, and proofs accompanying

them, are omitted from the record, thereby shortening it several hundred pages. In view of this record it would surely be very frivolous for appellants to question the correctness of these 1151 several amounts covered by this stipulation. *Twelve claims* are not covered by the stipulation, the petitions appearing in full in the record in twelve several claims These twelve will be considered separately.

1. Henry C. Adams, Assignee of Ind. Brass & Supply Co. The exact *amount* due on this claim is fixed by stipulation signed by Counsel for appellants. [Record, p. 241]. Of the $6,426.63 agreed to be due on this claim $5,623.30 is decreed to be paid by these appellants. [Record, p. 473]. and $803.33 is decreed to be paid by the purchasers of the Extension Ry. [Record, p. 492].

Hence this *amount* can not be questioned.

2. Pullman Palace Car Co. The exact *amount* of this claim is settled by stipulation [Record, p. 326],—and the whole amount is decreed against these appellants, purchasers of the Main Line—no sleeping cars ever having been used on the Extension. [Record, p. 481].

Appellants can not question this amount.

3. J. A. McKenzie. By stipulation the amount claimed in this petition is admitted to have been satisfactorily proved. [Record, p. 212.] Of the amount allowed $5,802.37 is decreed against these appellants [Record, p. 480], and $970.16 is decreed against purchasers of Extension Railway. [Record, p. 496.]

Appellants can not question this amount.

4. Second National Bank of Peoria. The exact amount of this claim is fixed by stipulation [Record, pp. 233, 234] and its correctness can not now be denied Of the $12,000 allowed, $10,500 is decreed against these appellants [Record, p. 476] and $1,500 is decreed against Extension Purchasers. [Record, p. 494.]

5. A. Snedeker. This petition is followed by an agreed statement of facts that determines the exact amount allowed.

[Record, pp. 235, 236.] Of the $7,092.63 decreed in favor of Snedeker, $6,206.05 is decreed against these appellants [Record, p. 459], and $886.58 is decreed against Extension Purchasers [Record, p. 484.] There is no room for controversy as to this amount.

6. Christian Waterman. This petition also is followed by a stipulation admitting that it is correct and satisfactorily proved. [Record pp. 234, 235.] This amount is decreed against these appellants, it being for labor performed on the Main Line. [Record, p. 458.] The correctness of this amount can not be disputed.

7. George Wooden. This petition furnishes its own proof. [Record. pp. 241, 242.] Its correctness as to amount has never been questioned. No evidence was introduced against it—none exists. Of this claim $5,629.78 is decreed against these appellants, and $804 25 against Extension Purchasers. [Record, pp. 477, 494.]

8. Thomas M. Rinn. This petition also furnishes its own proof. So complete and satisfactory was the proof—being the certificates of indebtedness issued by the company—that the appellants have omitted the proofs in making up this record. [Record, pp. 448, 449.] The amount of this claim is settled beyond controversy. It is all decreed against these appellants, being for labor and supplies performed on and furnished to the main line.

9. Second National Bank of Lafayette, Assignee of E. H Mayo. This petition is followed by a stipulation that the claim was properly filed and certified, and omitting the proofs from this record. [Record, p. 238.] Appellants certainly can not question this amount. Of this claim $6,175.50 is decreed against appellants, and $882.21 is decreed against Extension Purchasers. [Record, pp. 459, 484.]

10. F. A. W. Davis and others. This petition is based wholly on certificates of indebtedness, issued by the company for labor and supplies performed and furnished in the

ordinary operation of the road. The petition, and accompanying certificates, proved the *amount* beyond all dispute. No evidence was introduced against these certificates.

The certificates themselves are omitted from the record. [Record pp. 127 to 131.] The master's report on this claim shows that *the least possible amount* was allowed to the petitioners. [Record pp. 232, 233.] This report, upon argument of exceptions, was confirmed by the court. [Record p. 454.] In view of this record, it would certainly seem *frivolous* to attack the *amount* decreed. Of the amount allowed petitioners, $16,962 09 is decreed against these appellants, and $2,413.32 is decreed against Extension purchasers. The distribution of the amounts decreed to the several claimants, as between the purchasers of the Main Line and the purchasers of the Extension, was made in accordance with a stipulation. [Record p. 497.] The purchasers of the Extension have paid all the decrees against them.

This leaves only *two* claims, viz: The claim of James A. Eads, receiver of the Paris and Danville Railroad Company, and the claim of the Western Car Company.

Upon the claim of Eads, receiver, etc., as originally filed and prosecuted, a large amount of evidence was taken, the greater part of which was taken in reference to the right-of-way part of the claim, which has since been fully settled and is not included in this decree. The claim, as allowed in the decree of October 31, 1881, is for coal consumed by the I., B. and W. Ry. Co., in the operation of its railway, between June 1, and December 1, 1874. The petition and exhibits are in the record. [Record, pp. 94 to 110.] A glance at the exhibits filed with this petition shows that the court, by the *six months' rule* applied to this case, cut off and rejected about *two-thirds* of the coal claim. The master's report allowed $18,522.98 for coal consumed during the six months, fixing the price per ton at $1.80. [Record, pp. 288, 289.] Upon a careful review of the case, upon argu-

ment on exceptions to the master's report, the court *reduced the amount* allowed by the master, to $16,464.90—fixing the price per ton at $1.60, instead of $1.80 Of this sum allowed by the court, $14,406.79 is decreed against these appellants, and $2,058.11 against Extension purchasers. [Record, pp. 452, 453.] After the evidence has been taken, examined, and passed upon by the master, as to the question of *amount*, and after the Circuit Judge has carefully reviewed and considered the evidence as to the *amount*, and adjudged the sum due, it seems to us, that it may well be termed *frivolous* to ask this court to again review the evidence *on a mere question of amount*.

The Western Car Company was made defendant to the Farmers' Loan and Trust Company's cross bill in the Indiana Court because it had taken judgment against the I., B. and W. Railway Company for $212,138.40 for the rent of its cars, due and accrued *prior* to July 1, 1874. The answer of the Western Car Company in the Indiana Court and its intervening petition in the Illinois Court, and the replication and answer of the Farmers' Loan and Trust Company thereto, are in the record. [Record, pp. 191 to 195, and 196 to 205] At the time the Receiver was appointed about $300,000.00 was due the Western Car Company for the rent of 1,175 freight cars, which constituted the main part of the freight equipment of the Railway Company in the line of cars.

Under the operation of the *six months rule*, applied to this case by the Circuit Judge, nearly $200,000.00 of the claim of the Car Company was rejected and disallowed. For the use of 1,172 cars during the six months next preceding the Receivership, Masters Howland and Howland, after taking a large amount of evidence, and upon full argument and consideration, allowed to petitioner $105,480.00. [Record, pp. 230 to 232.] Upon argument on exceptions to the report, the Circuit Judge carefully reviewed and considered the evidence, and *reduced* the amount

allowed by the Masters to $100,082.65—the $5,397.35 reduction being for so much money received by the Car Company on account during the *six months*, which payment the Car Company credited upon rent accrued *prior* to the six months, but the court applied all payments made during the six months to rent accrued during the same period, and rejected and disallowed wholly all indebtedness accrued prior to the *six months*. The findings of the court touching this claim are in the decree of October 31, 1881. [Record, pp 450, 451.] Of the $100,082.65 decreed due, $87,028.39 is decreed against appellants Corbin, Taintor and Blossom. [Record p. 481], and $13,054.26 is decreed against purchasers of the Extension. [Record, p. 497.] As has been said regarding other claims, it seems *frivolous* to ask this, court to review evidence that has been fully considered by two special Masters, and carefully reviewed and considered by His Honor Judge Drummond, *upon the sole question of amount*.

We have now covered all the claims decreed, and submit that upon the face of the record, it is manifest that the appeal is simply for delay, and that the only question on which the jurisdiction depends—the question of the correctness of the several amounts decreed to these claimants—is so frivolous as not to need further argument. All evidence in the record in support of, or against, the allowance of the several claims adjudicated by the decree of October 31, 1881, will be printed and submitted herewith. As has been shown, almost all the claims decreed are covered by stipulations; the evidence touching those not so covered is in the record.

SECOND. Appellants have, in this court, admitted that they do not question the correctness of the several amounts decreed to these several claimants.

On page 22, of the argument filed in opposition to the motion to dismiss, submitted April 24, 1882, counsel for appellants, Corbin, Taintor and Blossom, say: "THE AP-

PELLANTS DO NOT DISPUTE, AND NEVER HAVE DISPUTED, THE CORRECTNESS OF THE AMOUNTS FIXED BY THE COURT. THEY HAVE NOT NOW, AND NEVER HAD, ANY CONTROVERSY WITH THE INDIVIDUAL CLAIMANTS."

Upon the face of the record, and upon the admission of appellants by their counsel, it is certainly true that this appeal —*when viewed as simply a contest against the several amounts decreed to these several claimants*, which, we contend, is the only question raised by the appeal—is frivolous and for delay merely.

7. If appellants now desire to limit their admission, applying it only to claims embraced in the motion to dismiss, and now avow their purpose to be to contest the *several amounts* in the cases in which the several decrees exceed $5,000, they will surely assume an illogical position. Their entire argument is based upon the theory that their sole controversy is with all of these claimants jointly. On the same page of their brief above cited we find this statement, viz: "The appellants' controversy is with all of them together, and the question is whether in fact and in law, a fund exists out of which these claims may lawfully be paid." It is clear that appellants claim that the decree of October 31, 1881, is one single decree in favor of all these claimants, while we contend that the record proves conclusively that the October decree contains 1163 *several decrees*, each based on a separate and distinct contract and state of facts, the only element in common being that all these several claims accrued in the operation of the I., B. & W. Ry.

Appellants claim the right under this appeal, to review questions determined and adjudicated by final decrees rendered more than four years ago and never appealed from, while we contend that the *only question* that can be raised by appeal from the decree of October 31, 1881, *is the single question adjudicated by that decree, viz: The amounts due on these several claims.*

If appellants now claim to contest the several amounts fixed by the court, *they must thereby admit that there does exist a* SEVERAL CONTROVERSY *between them and each of these several claimants.* If that is true our motion to dismiss—as to all decrees less than five thousand dollars in amount—for want of jurisdiction, is well taken, and amply supported by authority.

Oliver v. *Alexander*, 6 Peters, 143.
Stratton v. *Jarvis*, 8 Peters, 4.
Spear v. *Place*, 11 Howard, 522.
Rich v. *Lambert*, 12 Howard, 347.
Seaver v. *Bigelow*, 5 Wallace, 208.
Paving Co. v. *Mulford*, 10 Otto, 148.
Russell et al. v. *Stansell, Surv. Partner, etc.*,
No. 929, October Term, 1881, U. S. S. C.

We have always conceded the right of appellants to question the *amount* decreed in each case where the decree exceeds five thousand dollars. By this motion and brief we simply desire to submit that the face of the record and the admissions of appellants, clearly show that this appeal, as to *all* the claims, large and small, is for delay merely, and is frivolous, if we are correct in our contention that the foreclosure decree, and the decree confirming the sale under that decree, *adjudicated all questions* excepting "the question as to the *amount* of the *claims* or *sums* to be allowed" to these claimants. We ask that this motion may be considered in connection with the motion to dismiss, now under submission, and that the decree of October 31, 1881, may be in all things affirmed.

Respectfully submitted,

McDONALD & BUTLER,
CLAYPOOL & KETCHAM,
Solicitors for Intervenors.

By JOHN M. BUTLER.

Indianapolis, Ind., June 29, 1882.

EVENING POST JOB PRINTING OFFICE, 208 B'way, N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1882.

THE FARMERS', LOAN AND TRUST COMPANY AND OTHERS, *Appellants*,

vs.

CHRISTIAN WATERMAN AND OTHERS, *Appellees*.

No. 814.
(1212 *last term.*)

Appeal from the Circuit Court of the United States for the District of Indiana.

Argument in opposition to Appellees' motion to affirm.

JAMES D. CAMPBELL, *of Counsel.*

I.

Near the close of the last term we were called upon to oppose a motion to dismiss the appeals in this case, and, in the brief filed at that time, disclosed to the court, in a gen-

eral way, the nature of the controversy here. That motion still remains undisposed of. We are now confronted with a motion to affirm, on the ground that the appeal is taken for delay only, and the question involved is so frivolous as not to require argument in this court.

While we might object, as we understand the rules and practice of this court, to the joinder of these inconsistent motions—a motion to dismiss for want of jurisdiction, with a motion to affirm on grounds which necessarily confess the jurisdiction—we are not content to permit a challenge of the motives which lie behind our appeal to this court to review this record, to pass unanswered.

Before making specific reply to the re-statement of the argument, of which the present brief, filed on behalf of the appellees, mainly consists, we beg to suggest that the former discussion ought to be sufficient to show that the present motion cannot be justly sustained, either in respect to the magnitude of the questions involved, or the form in which they are presented for the consideration of the court, because that discussion clearly discloses:

First.—That from the beginning of this litigation to its end in the court below, there was a continuing contest between the Farmers' Loan and Trust Company and the bondholders whom they represent on the one side, and certain unsecured floating debt creditors on the other, in respect to a fund amounting to upwards of four hundred thousand dollars; a contest covering a period of seven years; and that during all that time neither party ever yielded for a moment to the claims and pretensions of the other in respect to this vast sum. Surely it may not be lightly said, in respect to either party to such a controversy, that an effort to secure the consideration of such a question by any of the constituted tribunals of the law, is only made for delay. Surely there is nothing in the history of the administation of justice to lead to the presumption that there can be no substantial error in the record of such a cause. This as to the magnitude of the controversy and the questions it involves or may involve.

Second.—It also appears by the former discussion that these bondholders, holding mortgage liens to the amount of upwards

of five million dollars, have, against their constant protest, been postponed to the extent of upwards of four hundred thousand dollars in favor of the appellees, who are unsecured floating debt creditors of their common debtor, without competent, legal evidence of any fact which, according to the rules and principles established by this court, would authorize or justify that postponement, and that, upon narrow and technical grounds, looking only to the form and not to the nature and substance of the procedure, the appellees have contended that this court has no jurisdiction to review the processes by which this result has been effected.

Third.—It also appears that the court below, while adopting unusual and irregular methods of procedure in the supposed interests of justice, and with a view to the conservation of a vast property, has at all times sought to preserve to these appellants the very right they are now endeavoring to secure, that is to say, the right to have the procedure and decree of that Honorable Court reviewed here—a right stipulated for at every step and stage of the proceedings, and expressly reserved in every decree or order substantially affecting the question; and that both the motion to dismiss and the present motion are in direct conflict with the express terms and the spirit and purpose of these reservations solemnly embodied in the decrees.

These suggestions alone, we humbly submit, abundantly negative the grounds relied upon to sustain the present motion and entitle appellants to be heard at the bar of this court. Nevertheless, we deem it to be our duty to point out more distinctly some of the many considerations, suggested by the record, showing that this motion may not justly be sustained.

II.

We object to the consideration of the present motion as a finality until the record has been printed and is fully before the court in accordance with the rule.

In explanation of this objection, we have to say that before the submission of the motion to dismiss for want of jurisdiction at the last term, it was stipulated between counsel that, *for the purposes of that motion*, a part only of the record should be printed, sufficient, as was supposed, to raise and to determine the question of jurisdiction. Pursuant to that stipulation, the appellants caused to be printed part 1 of the transcript, being that part of the printed record marked No. 1212.

Since the last term part 2 has been printed, being pages 628–996 of the printed record, containing certain documents and testimony wholly immaterial, in our judgment, to any question to be raised in this case.

There remains yet to be printed, however, all that part of the transcript showing the proceedings before the Special Master under the order of reference of February 13, 1880 (Record, 361), and all the testimony taken by him and upon which the final order for the payment of these claims is based.

Without this part of the record before them, it will be impossible for the court fully to consider the questions raised by the motion to affirm. These proceedings show—

1. That the claimants relied entirely upon certain tables and schedules prepared by an expert from the books of the company, and upon other immaterial and incompetent testimony, for proof of the facts involved in the order of reference.

2. That this form of evidence was strenuously objected to by the appellants, as against them, who are entire strangers to these transactions, and that they at all times insisted that proof of the facts should be made in accordance with the ordinary rules of evidence.

3. That there was no competent or legal evidence of any of the facts necessary to authorize or justify the order for the payment of these claims under the rules and principles established bythis court in *Fosdick* v. *Schall*.

4. That the books, paper and accounts of the company from which the statements were prepared by the expert, were in a state of *confusion* and *uncertainty*, introduced by *arbitrary* and

unwarrantable manipulation (see Master's report, Record, p. 408), so as to be utterly unworthy of any consideration as evidence.

5. These proceedings also show, in our judgment, that the exceptions to the report of the Master, set forth on pages 438, 439, and 440 of the printed record, should have been sustained; and finally,

6. These proceedings are necessary to show to the court the nature and character of the questions involved in this appeal.

The writer has delayed preparing this reply to the brief in support of the present motion, in the hope that he would be furnished with that portion of the record above referred to before the time fixed for submitting the motion. This brief is now filed, saving and reserving the objection, assuming that the record may yet be printed in due season.

III.

The argument in support of the motion to dismiss is mainly based upon the assumption that the decree of sale of July 24, 1877 (Record, 213) was a final decree respecting the payment of these claims, and only left to be determined the amount due the several claimants from the debtor company, under certain limitations mentioned in the decree. This assumption, we think, will appear, with very little examination, to be entirely unfounded. On the contrary, it does appear affirmatively that the decree was not final in respect to the rights of either the claimants or the trustees; that it was never treated by any of the parties as being final, and that it has been construed and acted upon by the court as simply interlocutory and not final in this regard.

1. *The decree not final.*

It is entirely obvious, from the cases cited in appellee's brief, that the solution, of the question whether a given decree is to be considered as final or otherwise depends altogether upon the nature of the matter in controversy and the effect of the decree. It also appears that a decree may be final in respect of some of the matters disposed of, and not as to others, in respect to some of the parties affected and not as to others. It may be entirely true that decrees of this character are not looked upon with favor, and that they are, or should be, discouraged. At the same time it cannot be denied that cases do arise where the Chancellor might, nay, ought, to dispose of certain matters finally, while leaving others in the same decree open to further controversy. At all events, it is not to be controverted that a Chancellor *may* so frame a decree as finally and effectually to determine and dispose of certain of the rights or the parties, while leaving other rights or parties still in litigation. Such things certainly have been done, and are likely to be done again. And because a decree has been so framed by the Chancellor as to be final as to some matters, it does not follow that the appellate court is bound to treat it as final in everything. Nor, because a decree is merely interlocutory in some respects, does it follow that the appellate court is bound to treat and consider it as wholly interlocutory.

The decree of July 21, 1877, was undoubtedly final in respect of some of the matters determined, and in respect of some of the parties. It was a final decree in fixing the amount due from the principal defendants to the mortgagees, and in decreeing the sale of the property. It was final in many other respects, which are not now, and never have been, in controversy. But it contained no element of *finality* in respect of the sums ultimately allowed to these complainants by the decree of October 31, 1881. It is final in this respect, neither in its substance nor its form. The provision in regard to these claims is contained in article 14 of the decree (Record, p. 219).

"That of the purchase money * * so much * * shall be paid into court in cash * * as shall be necessary to pay * * * that portion of all such other claims and sums of

money as shall be hereinafter allowed by this court * * * in preference to the liens of the hereinbefore mentioned mortgages or deeds of trust, for debts due by said railway company for work, labor, supplies and materials done and furnished, during the six months next preceding the first day of December, A. D. 1874, which payment for debts due as last aforesaid, for six months prior to December 1, 1874, shall be made into court without prejudice to the right of the Farmers' Loan and Trust Company to object to the same, and to appeal from any order or orders which may be hereafter made by the court directing the money so paid to be distributed to the various claimants thereof."

So far as this subject is concerned, then the decree is merely interlocutory, and requires the payment of the fund into court, to be subsequently disposed of as the court may be advised upon further consideration. Notwithstanding these provisions, the court might, without the slightest inconsistency, have decreed the whole amount of the fund to the complainants to be distributed to its bondholders; and until the order had finally passed ordering the distribution of the fund to the claimants, no one could be aggrieved, nor could any party take an appeal.

In the nature of the circumstances existing at that time, it was utterly impossible that the court should have entered a final decree in respect of these claims. An inspection of the record will show that perhaps not one in a hundred of the claims had ever been presented at that time; and it is not to be conceived of for a moment, that a final decree was entered in favor of parties who had not yet come into court. It appears by the stipulation (Record, p. 195) that the bulk of these claims was first presented to the Masters Howland. The report of these Masters was not filed until November 7, 1877 (Record, 242), more than three months after the date of the entry of the decree!

Great stress is laid by counsel in argument upon the provision contained in a clause of paragraph 20 of the decree (Record, 223):

"And it is further ordered, that any of the parties to this action may apply to the court for such other or further directions at the foot of this decree as may be necessary to carry it into effect, no question being reserved except the question

as to the amount of the claims or sums of money to be allowed, as provided in the fourteenth clause of this decree. Such allowance or disallowance shall take effect as if now incorporated in and passed upon by this decree."

This clause, we submit, is not the decree, nor does it form any part of the decree. It is no more than a contemporaneous judicial construction put upon the decree by the learned judge, for the benefit of all parties; and its office and function is to declare the judicial intention to be that the decree is *not final* as to the subject reserved, but is to be taken as final and conclusive in respect to all matters not expressly reserved. Hence, the decree is final, except only "as to the amount of the claims or sums of money to be allowed, as provided in the fourteenth clause of this decree." It was not *final* in that regard, for the very obvious reason that up to that time not one-tenth of the claims had yet been presented to the court; nor had any inquiry yet been made or even directed in respect to the facts upon which an order for their allowance or disallowance could justly be made.

But counsel construe this language to mean that the court having already determined to allow *all* claims or sums of money for debts due by "said railway company for work, labor, supplies or materials done and furnished during the six months next preceeding the first day of December, 1874, in the operation of" said railroad, only intended to reserve the question of the amount of such liabilities of the old company which accrued within that period—whether there had been unjust and inequitable diversions from the earnings for the benefit of the bondholders or not, and whether there were any net earnings of the Receivership or not; and that it was absolutely and arbitrarily determined, without inquiry and without evidence, before the claimants were even in court, that these old debts should be paid, and the court only reserved to itself the time and opportunity to ascertain the amount of such indebtedness. And counsel also contend that the arbitrary and unwarranted and unwarrantable decree so entered not having been appealed from within the time limited by law, must stand as a finality. The mere statement of the proposition, it seems to us, should furnish its own refutation. We submit, on the contrary, that no such purpose can be im-

puted to the eminent and learned judge who framed the decree, and that even if, by some accident or omission, it should appear to have that effect, every intendment and presumption should be employed to avoid so unreasonable an interpretation.

On the other hand, we insist that it is the clear and fair meaning of the statement in the decree, that the court intended to reserve every question involved in determining the amount to be allowed to the claimants, if anything; that is to say, not merely the question as to the amount due to the several claimants from the old company, which was never disputed as to a vast majority of the claims, but also every question involved in fixing the amount of the available fund, including the question of the amount of the net earnings of the receivership, the amount of moneys diverted from earnings for the benefit of the bondholders, and also the question whether the fund could or might be taken from the proceeds of the sale. To construe this language otherwise, would, in effect, leave the great rights involved in this controversy to depend upon a mere verbal trick; and but for the earnestness, if not vehemence, with which the contrary view is urged here, we should be amazed that there could be the slightest doubt raised in regard to the correctness of our apprehension of this language.

But we are not obliged to rest upon these considerations alone.

2. *The learned judge has never interpreted or acted upon the decree as final, in respect to these claims.*

May 8, 1878 (Record, 304), nearly a year after the entry of the original decree, and as this court will judicially notice, long after the end of the term, the court entered an order modifying the terms of the original decree, by abrogating the provision of the original decree requiring the fund to be paid into court, and by providing that the fund should remain in the property, and the amount paid when ultimately determined, by the purchasers, in addition to their bid.

It is only on the assumption that the original decree was not final, that it was competent for the court to make this modification. If the decree was final, the court had no juris-

diction to so alter its form and substance after the end of the term, and the modification is absolutely void.

Although the Master's reports showing the amount of these several debts due by the old company were filed Nov. 7, 1877, the court forbore to order their payment, but suspended its judgment during the pendency in this court of the case of *Fosdick* v. *Schall*, and after the opinion was announced in that case directed an inquiry (Record, 361), February 13, 1880, nearly three years after the entry of the original decree, in respect to the question of inequitable diversions of earnings, &c., &c., which is altogether inconsistent with the decree, if it is to be taken as final.

Lastly, the basis of the final allowance of these claims as shown by the recitals of the final decree, is in direct conflict with the theory that the original decree was final. It is recited in the final decree (Record, 449):

"And the court, upon said reports and the evidence returned therewith, finds that within the period named in said order of February 18, 1880, the earnings of said Indianapolis, Bloomington and Western Railway that ought to have been applied to the payment of the several claims hereinafter referred to, were diverted to the payment of interest on bonded indebtedness of said railroad company, additional equipment purchased for, and lasting and valuable improvements made upon said railway to the amount of five hundred and eighty-seven thousand dollars."

This finding is made the basis of the final decree, and inasmuch as the inquiry upon which that finding is based was not even directed until nearly three years after the entry of the original decree, it clearly follows that the court itself did not act upon the original decree as being a finality, but proceeded to act upon the supposition that the entire subject was still open to consideration and determination up to the time of the rendition of the decree appealed from.

No final decree having been entered, therefore, until the decree of October 31, 1881, from which this appeal is taken, all the questions involved in the allowance of these claims are now before the court, excepting only as to the amounts of money due to the several claimants from the old company,

which is not in dispute, and all of the appellants should be heard to object the decree finally passed.

III.

In their former brief, as well as that now filed, it is strenuously urged that neither the Farmers' Loan and Trust Company, nor the purchasers, can now be heard to object to the final decree, for the reason that the sale was made subject to the payment of these claims absolutely, by virtue of the modification of the original decree ordered, May 8, 1878 (Record, 304).

In the brief already filed we have called the attention of the court to the grounds upon which the appellants rest their right to be heard here, and we ask the attention of the court to what is there stated, in the consideration of the present motion.

To what has already been said, we only care to add that, if the provisions of the original decree had been carried out by a sale of the property, and the payment of the purchase money into court, the right of the bondholders and their trustee to assert their claim to the entire proceeds, both in the court below and in this court, could not have been successfully gainsaid. But the court saw fit, in the exercise of its discretion, to provide by the modification of the decree that this particular fund should, instead of being brought into court to abide the result of the litigation, remain in the hands of the purchaser, secured upon the body of the property itself, at all times saving the right of all parties interested to appeal to this court from any order disposing of that fund. We submit that this change of the custody of the fund made for the purpose of better protecting the interest of all the parties, and which is a matter of mere form, can neither be taken to deprive this court of its jurisdiction conferred by law, nor to deprive the parties of their right to be heard in this court, especially in the face of the express reservations by which the right of appeal was saved and preserved by the court.

If the fund had been brought into court, and subsequently distributed to the claimants, the trustee would have been aggrieved by the taking it away from its *cestuis que trust*. It is now aggrieved to the same extent, and in the same sense, by the effect of the decrees, because, at least, to the extent of the amount of these claims, the proceeds of the sale distributable to the bondholders was substantially diminished. It is not the form by which the result was reached, but the fact that this vast fund has been taken from the bondholders and distributed to these claimants, not in conformity to, but as we contend, in direct conflict with the principles of law laid down by this court, that is complained of, and we are confident that we have a clear right to submit both the process and the result to the scrutiny of this court.

That there is a substantial controversy here presented in good faith, and to be urged with great confidence of ultimate success, will sufficiently appear from the report of the Master (Record, 390), and the exceptions to the report (Record, 438) in connection with the order of the court (Record, 361) by which the inquiry was directed.

We expect to show to the court from this record:

1. That under the terms of the original order appointing the Receiver there was not one dollar of net earnings of this property at any time available for the payment of any of these claims.

2. That there is no competent or legal evidence of the diversion of any part of the earnings, either by the old company or by the Receiver to the payment of interest upon the bonded debt of the company, to the acquisition of new equipment, or to the making of lasting and valuable improvements.

3. That, on the contrary, all the disbursements of that nature were made out of the proceeds of bonds sold or hypothecated, and out of moneys borrowed from other persons than those who have presented claims therefor; and

4. That in no respect does the decree appealed from, under the facts shown on the record, conform to the principles laid down by this court in the case of *Fosdick* v. *Schnoll*, and similar cases.

IV.

Counsel have again repeated in the present argument what was frequently reiterated in the former brief, to the effect that the trustee consented to these orders and decrees. This assertion we must again take occasion to deny. It should be sufficient to point the court to the express reservations contained in the several decrees saving and reserving the right to object and protest, and the right to appeal from any order distributing this fund to the claimants.

At the same time we feel bound to assert our entire disagreement with counsel when they take the ground that in chancery proceedings every order or decree should be taken as consented to unless an exception is noted at the time. We understand the rule to be directly to the contrary—that is to say, that unless the record shows in some form that an order has been made by consent, it remains open to review by the appellate court in a proper case and upon due assignment. No consent was ever given to any order ever entered in this suit, looking to the payment or ultimate allowance of any of these claims, except the agreement usually made in chancery cases by counsel, that a given order or decree is in conformity with the decisions of the court, and the instructions given respecting the draft, by the Chancellor. We point with great confidence to this record, in confirmation of this statement. There does not appear anywhere the slightest foundation for the repeated assertions of counsel that these orders were taken by consent.

Moreover, the record invariably shows, on the face of every important or material order, the express reservation of the right of the trustee and the purchasers to protest and object to the payment of these claims.